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No. 14626

United States
Court of Appeals
For the Ninth Circuit.

See Vol.
3031
3032
3030

JESSE E. HALL, WEATHERFORD OIL TOOL COMPANY, INC., a Corporation; WEATHERFORD SPRING COMPANY OF VENEZUELA, C.A., a Corporation; HALL DEVELOPMENT COMPANY, C.A., a Corporation; WEATHERFORD, LTD., a Corporation; WEATHERFORD INTERNACIONAL, S.A., DE CV., a Corporation; NEVADA LEASEHOLD CORPORATION, a Corporation; PARKER INDUSTRIAL PRODUCTS, INC., a Corporation,

Appellants,

vs.

KENNETH A. WRIGHT and B & W, INC., a Corporation,

Appellees.

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Appellants,

vs.

JESSE E. HALL, WEATHERFORD OIL TOOL COMPANY, INC., a Corporation, et al.,

Appellees,

Transcript of Record
In Nine Volumes

Volume VII
(Pages 3017 to 3384)

**Appeals from the United States District Court for the
Southern District of California,
Central Division.**

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Court of Appeals
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(Testimony of William A. Doble.)

Q. Mr. Doble, I believe we were last discussing the Acme scratcher which you had made, or had made by Adams-Campbell Company. Was a second set of such Acme scratchers made?

A. Yes, sir.

Q. And that second set of Acme scratchers is illustrated by a set of photographs, and also the scratchers themselves were sent to the Patent Office, I believe; isn't that correct?

A. Yes, sir; that is correct.

Q. Those scratchers, that second set of Acme scratchers, are shown by what photographs, Mr. Doble? [3539]

* * *

A. I find in the list of exhibits the Exhibit CD-1, which is a physical exhibit of the Acme 5½-inch scratcher; and in Defendants' Exhibit CE-1, a physical exhibit of a 3½-inch Acme scratcher.

Q. Mr. Doble, those second Acme scratchers differed, did they not, from the Acme scratchers that you have described upon which you made the first tests; is that correct?

The Witness: May I have the question read, please?

(Question read by the reporter.)

A. That is correct to this extent: The angular axes of the coils formed in each of the scraper wires was angled so that it was not—that is, the axis of the coil did not coincide with a radial line

(Testimony of William A. Doble.)

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(Testimony of William A. Doble.)

of the scratcher body. Otherwise they are the same. [3545]

Q. Just to take an illustration of what you are talking about so the court may understand it, I will place before you a scratcher which is not intended to be the one I am talking about—it is Exhibit EF, so the record will show. This scratcher has wires on it and it has coils in it. What do you mean by the radial extent of those coils, Mr. Doble?

A. I have in my hand Defendants' Exhibit EF, which comprises a cylindrical collar or sleeve. The cylindrical collar is provided with two sets of holes projecting through the periphery of the collar. Extending through each of the holes in the collar is a coiled spring. And that coiled spring is formed in each one of the wire fingers or bristles of the scratcher.

Now, that coil or the coil for each of the scratcher wires or bristles is wound around an axis. The axis or axes of the coils of the first Acme scratchers are made, some were approximately radial and some were slightly divergent from radial. And by "radial" I mean the axial line of the coil if projected inwardly would pass through the center of the diameter of the sleeve or body portion of the scratcher.

There was some question in regard to the way those particular coils were related to the scratcher body, so I had a second set of the Acme-type scratchers made in which [3546] the direction of the axis of each of the coils was purposely formed

(Testimony of William A. Doble.)

so that it would not lie on the normal axis of the scratcher body which passed through the center of the cylindrical sleeve.

Q. And do these photographs which you have referred to heretofore show the second form of Acme scratcher which was made with the coils not radial, or, as it has sometimes been referred to, canted coils?

A. I referred to physical exhibits, Mr. Lyon, not photographs. But there are photographs of those physical exhibits, I believe, and those photographs do show that the axes of the coils are canted, as you say, with relation to or respect to the true axis or the true radii passing through the center of the cylindrical body. [3547]

* * *

Q. Mr. Doble, you were speaking of the Acme scratchers at the time of adjournment. I place before you Exhibits for identification CH and CI and CE-1 and CD-1, as well as two gauge rings, Exhibits CE-2 and CD-2, all notations being for identification, none of these particular exhibits having been before offered in evidence, and I was asking you with respect to the Acme scratchers upon which the tests you have made and the actual scratchers which were sent to the Patent Office. How do these exhibits compare, if at all, with the exhibits that were sent to the Patent Office?

* * *

A. Thank you, your Honor. Exhibits CI and

(Testimony of William A. Doble.)

CD-1 are [3550] exemplars of the Acme type of scratcher which I testified to during my opening deposition in the matter before the Patent Office.

The Court: Made by whom, if you know?

The Witness: Yes, your Honor. They were made under my direction by the Adams-Campbell Company, which firm is located down on Los Angeles Street, I think around 17th or 18th and Los Angeles Streets, in Los Angeles.

L. E. Lyon: In accordance with the instructions that you testified to last Friday?

The Witness: Yes, sir.

L. E. Lyon: All right. Now, what were these?

The Witness: Exhibits CE-1 and CH are similar to the 3½-inch and 5½-inch Acme type of scratchers which I testified to in my rebuttal depositions in the proceedings before the Patent Office.

Mr. L. E. Lyon: Now, in regard to your deposition in evidence with respect to these scratchers, it is necessary to correlate these particular exhibits with the exhibits which were offered in the Patent Office.

May it be stipulated that the witness, in speaking of the Patent Office exhibits of the 3½-inch size, is speaking about the Petitioner's Exhibit CC before the Patent Office, which corresponds with the 3½-inch first one, Mr. Doble.

Q. What is that? [3551] A. That is CI.

Q. CI—and that the gauge ring for that sample, which was Petitioner's Exhibit DD before the Patent Office, the exemplar here is——

(Testimony of William A. Doble.)

A. Exhibit CE-2.

Q. All right. Now, the larger size, the 5½-inch diameter Acme type scratcher, of the first type which you made, was Exhibit AA before the Patent Office, and that is here, Mr. Doble——

A. It is Defendants' Exhibit CD-1.

Q. And the gauge ring for that scratcher was Petitioner's Exhibit BB before the Patent Office and is here——

A. CD-2.

Q. All right. Now, the second form of scratcher, Acme scratcher, before the Patent Office, the Acme scratcher with the canted coils before the Patent Office was Exhibit IIIIIII——

Mr. Scofield: Before the Patent Office?

Q. (By Mr. L. E. Lyon): ——and there are two of them here. Do we have both sizes?

A. Yes, sir.

Q. I don't see it here.

A. I gave those exhibit numbers this morning, Mr. Lyon.

Mr. L. E. Lyon: Was Exhibit IIIIIII the Acme type scratcher before the Patent Office? According to this list I have in front of me, it does not show which size it was. [3552]

* * *

Mr. L. E. Lyon: Well, IIIIIII, we are talking about those in rebuttal, Mr. Doble, with the canted coils, yes.

The Witness: Yes, sir, and that is CH, for the 5½-inch Acme with the canted coils.

(Testimony of William A. Doble.)

Mr. L. E. Lyon: All right. That is CH.

Q. How about the 3½-inch Acme scratcher with the canted coils?

A. The 3½-inch Acme scratcher with canted coils is Defendants' Exhibit CD-1.

Q. Was that before the Patent Office?

A. I don't know.

Mr. L. E. Lyon: We will have to supply that. It is not on this list, if there was one. I mean the 3½-inch coils before the Patent Office. I am not talking about the [3553] ones here.

Q. All right. Now, Mr. Doble, these scratchers you have testified—— [3554]

* * *

Mr. L. E. Lyon: Look at your own list. CE-1 is what you have got down here. Let us let that go and straighten it out after we get time and make a stipulation.

Q. Mr. Doble, you have before you these exhibits of the Acme type scratcher and also have before you the gauge rings. What is the purpose of the gauge rings?

A. The purpose of the gauge rings was to be able to accurately check the over-all diameter across the free ends of the scratcher wires.

Q. That over-all diameter was made in accordance with the specifications of Exhibit A, I believe, is that correct? A. That is correct.

Q. And the outside diameter of the 3½-inch

(Testimony of William A. Doble.)

Acme [3556] scratcher is what? Have you got Exhibit A in front of you?

A. Yes, sir. I believe it is $8\frac{1}{4}$ inches.

Q. What is the one for the $5\frac{1}{2}$ -inch Acme scratchers?

A. The diameter of the gauge ring, Defendants' Exhibit CD-2, is $10\frac{1}{4}$ inches.

Q. Is that true of both of these models with and without the canted coils? A. Yes, sir.

Q. And both of them, the $3\frac{1}{2}$ -inch size and in both cases, will fit the $3\frac{1}{2}$ -inch gauge ring, and the $5\frac{1}{2}$ -inch sizes will fit the $10\frac{1}{4}$ -inch gauge ring, is that correct? A. Yes, sir.

Q. The scratchers, aren't they made to have a diameter greater than the inside diameter of the hole into which they are to be placed?

A. Yes, sir.

Q. Then we must assume that these particular scratchers, as advertised in Exhibit A of this outside diameter to be placed in a hole smaller than their non-use outside diameter; isn't that correct?

A. That is correct.

Q. In that case, in case they were inserted in a hole of a smaller diameter, how would they appear in comparison with the positioning of the scratcher as shown in Exhibit EL, [3557] Mr. Doble? And I believe EL was offered in evidence, was it not?

A. It is not so marked.

The Court: What is the exhibit, again?

Mr. L. E. Lyon: EL.

(Testimony of William A. Doble.)

The Clerk: This one, January 28th, admitted in evidence.

Mr. L. E. Lyon: All right. It is in evidence then, is that correct?

The Court: The card is not marked?

Mr. L. E. Lyon: No, the card is not marked.

The Court: Very well, the clerk will mark the card.

Mr. L. E. Lyon: In answering that question will you point to the portion of EL to which you have reference? I believe the best way of doing that is by the outside marked diameter, Mr. Doble.

A. I have before me Defendants' Exhibit EL and Defendants' Exhibit EL comprises a brass structure having an inner cylindrical tube or sleeve which represents or simulates the casing which is normally lowered down into a well. It has a spiral brass casing spaced from the simulated casing and the area of that outer brass casing represents—that is, the area I am referring to at this moment—represents the depth of 8,475 feet, diameter of hole 8 13/16ths. And the spacing between the simulated casing and the outer wall of the spiral casing or shell has the smallest distance [3558] between the periphery of the cylinder simulating the casing going in the well and the outer wall, and it shows the manner in which each of the wires of the scratcher are wrapped around to a more or less degree, around the body of the scratcher and then extend to have their free ends engage the outer wall of the shell case.

The next section of the outer shell case represents

(Testimony of William A. Doble.)

a depth of the well which this model illustrates of 9448 feet, diameter of the hole 14 inches and 13/16ths, and adjacent this section there will be observed that the scratcher wires, or the wires of the scratcher that is, the free ends of those wires do not engage the outer inner wall of the shell casing.

Q. Indicating what?

A. Indicating that the free ends of the scratcher wires would not engage the wall of a well bore having a diameter of 14 15/16ths inches.

* * *

Q. (By Mr. L. E. Lyon): And does that have any indication, Mr. Doble, as to the non-engaged inclination, sidewise [3559] inclination of the wires in Exhibit EL, and by that I mean this larger diameter section of EL?

A. That is correct, Mr. Lyon. It indicates that there is no force acting upon the free ends of the scratcher wires which in any way affects the angular or sidewise inclination of the wires with respect to the periphery of the outer wall or casing of the scratcher proper.

Q. The normal sidewise inclination, Mr. Doble, of the wires of Exhibit EL with respect to a tangent is how many degrees away from a tangent? Can you determine that approximately with respect to the instrument which you have in your hand?

A. I would judge, roughly, that the angle of the wires, that is, at least one of the wires—because they

(Testimony of William A. Doble.)

all appear to have slightly different angles—is in the neighborhood of 25 degrees from a true tangent.

Mr. Scofield: I object to that unless the depth is indicated; that is, I understand that there are two or three depths also indicated.

Mr. L. E. Lyon: That is where the wire is not engaging the wall of the model, Mr. Scofield.

The Court: Is that a correct description?

The Witness: Yes, sir.

The Court: Of the angle you are testifying about with what Mr. Lyon just stated? [3560]

The Witness: Maybe I did not understand it, but it seems to me that I was measuring the wire in the free portion, that is, where the ends of the wires do not engage the outer wall of the shell case; and so there is no force or pressure acting on those wires to in any way change the angular relation of those particular wires to the relation of the body of the scratcher.

The Court: And the degree of angle you gave was with reference to that?

The Witness: Yes, your Honor. And I must say it is a very rough measurement because each of the wires seems to have a different angle, oh, maybe varying between five or 10 degrees.

Q. (By Mr L. E. Lyon): Mr. Doble, if these wires were a true tangent in this model, Exhibit EL, would there be more or less wrapping around the collar in the section, for example, in indicated depth of 8475 feet?

A. There would be more wrapping of the free

(Testimony of William A. Doble.)

end of the wire around the body portion of the scratcher.

Q. Would that or would that not have any effect upon the wires balling up?

A. It would have a tendency for the wires to ball up and possibly tangle one with the other.

Q. Mr. Doble, in these models of the Acme scratcher which you have testified about what are the angle relations [3561] of those scratcher wires with respect to the tangent, and give us for each one of the models, will you?

A. Yes, sir. I will now test the angles of one of the scratcher wires on Defendants' Exhibit CI, and the wire that I am measuring has a negative tangent angle of roughly 10 degrees.

Q. What do you mean by a negative tangent angle?

A. That is, the free end of the scratcher bristle extends for the sidewise inclination closer to the body portion of the scratcher than the normal tangent would extend.

Q. Is it fair to say with respect to this Model EL that the wire that the angle makes with respect to the collar—I just want this for the purpose of comparison—is 25 degrees less than a tangent; and in the model you just measured it is 10 degrees more than a tangent?

A. Yes, sir.

Q. All right; proceed with the next model.

A. I will next check the angular relation of one of these free lengths of wire extending from the scratcher Defendants' Exhibit CD-1; and, as best I

(Testimony of William A. Doble.)

can read the measurement, the tangent angle of the wire that I am measuring has a five-degree-plus angle with relation to the true tangent.

Q. Is that less or more? [3562]

A. It is less, that is, it is less if we refer it with relation to the radius extending from a true tangent. Instead of being 90 degrees from an extended portion of the radius it is 85 degrees.

Q. That doesn't do us much good. We made a comparison on EL. Is it on the side away from a tangent that EL is, or the other side?

A. EL is 25 degrees less than a tangent.

Mr. L. E. Lyon: We agreed, at least this must be further. [3563]

* * *

Q. Is this less than 90 degrees on the same side of the tangent that EL is less than a tangent?

A. No. It is on the other side.

Q. All right. Then it is five degrees more than tangent where we use EL as a basis of comparison, isn't it?

A. No. I am wrong. It is less.

Q. It is on the same side with EL then, isn't it?

A. That is correct.

Q. All right. Then let us keep in mind EL and make our pluses and minuses the same as that is.

A. Yes, sir. I will now measure the angle in Defendants' Exhibit CE-1, and the tangent angle that I am measuring indicates a five-degrees-more-than-a tangent angle, relating that five degrees to the manner in which we measured the tangent angle in Defendants' Exhibit EL, I believe it was.

(Testimony of William A. Doble.)

Q. EL. A. EL.

Q. All right. Proceed with the next one. [3564]

* * *

Q. Now, the next model, Mr. Doble, give us the exhibit number in advance. Which one are you working on now? A. Defendants' Exhibit CH.

Q. All right. Now, CH is what angle?

A. As closely as I can read the angle on this Exhibit CH, for the particular wire that I am measuring, it appears to be exactly tangent.

Q. All right. Now, Mr. Doble, did you test all of these scratchers of the form of these exemplars which you have before you—and those are Exhibits CI, CE-1, CH, and CD-1?

A. Test them in what way, Mr. Lyon?

Q. Well, in apparatus similar to the test apparatus to which you have previously testified, as shown by the photographic exhibits here in evidence that you testified to Friday. A. No, sir, I have not.

Q. Which ones did you test?

A. I tested a scratcher similar to Defendants' Exhibit CI, and another scratcher similar to Defendants' Exhibit CD-1.

Q. And how did the tests of those scratchers compare [3565] with the tests you made of Jones and Berdine wall-cleaning guide, Nu-Coil, Multiflex, and Weatherford scratchers that you testified to Friday?

Mr. Scofield: Objected to as evidence not the best. I don't think there is anything in the record

(Testimony of William A. Doble.)

as to what tests were made on these particular scratchers. There are on the Jones and Berdine wall-cleaning guide, but I recall no tests made on these scratchers. It is calling for a conclusion.

Mr. L. E. Lyon: I am asking him for a comparison of the tests, your Honor, the tests he made himself.

The Court: The objection is that there is no evidence as to what tests he made.

Mr. L. E. Lyon: He has already testified that he made a test of these two scratchers on this same machine.

Q. Now, were these tests carried out in the same way, Mr. Doble? A. Yes, sir.

Q. By you?

A. Yes, sir, that is, under my direction and by me.

Q. And by the same test rings?

A. Yes, sir.

Q. Or cylinders, and the same apparatus as you testified to Friday? A. Yes, sir. [3566]

* * *

Q. Will you state briefly what the tests were that you made of these two models and give me what the results of such tests were?

The Court: These two models, Exhibits——

The Witness: CI, your Honor, and CD-1.

The Court: Exhibits CD-1 and CI for identification?

The Witness: Yes, your Honor.

Q. (By Mr. L. E. Lyon): All right.

(Testimony of William A. Doble.)

A. Defendants' Exhibit CI was placed on the simulated casing 18 of the test machine.

Q. Let me ask you this, Mr. Doble: isn't there complete testimony with respect to those, the tests you made on those two samples, in your deposition given before the Patent Office? [3567]

A. I do not remember it, Mr. Lyon.

Mr. L. E. Lyon: All right.

Q. Then proceed.

The Court: In any event, you made the same tests——

The Witness: Yes, sir.

The Court: ——that you made with respect to the matters shown in the various NNNN exhibits you testified to Friday?

The Witness: Yes, sir. We have photographs showing it.

The Court: Now, the question is as to the result of those tests on Exhibits CI and CD-1.

The Witness: Yes, your Honor.

The tests were the same, namely, that the scratcher was forced into a blackened cylinder, which had been polished and then painted with showcase paint. The scratcher was progressed in each case through the cylinder. I observed the black surface and noted the lines scribed by the free ends of the wires, and those lines were vertical for the major part throughout the length of the travel. I had observed the wires and also the markings on the cylinders in each case at the reversal point showed the rotation of the scratcher body with relation to

(Testimony of William A. Doble.)

the simulated casing 18 in the same manner as was conducted in the other tests.

The same results were obtained with Defendants' Exhibits CI and CD-1. In each case the main travel of the scratcher wires down the cylinder were relatively straight lines. The [3568] wires reversed at the end of the stroke, and at each reversal point the body portion or sleeve portion of each of the scratchers rotated with relation to the simulated casing.

I think there is a photograph as one of the exhibits showing the operation of a scratcher similar to Defendants' Exhibit CD-1 that has been marked for evidence—I don't know, I believe it is in evidence—and that photograph of the half-cylinder has an "A" on it to identify that half-cylinder as having been made with an Acme type of scratcher. It is one of the N series, Mr. Lyon.

Mr. L. E. Lyon: Well, I will have to ask the court to let you look at the N series that are in evidence, that he has, and pick it out, because I can't do it.

There is supposed to be a test cylinder in here. Get the other ones, the exhibits that accompanied his rebuttal testimony.

Mr. Clerk, there is another book of exhibits of that kind.

The Witness: I have a photograph.

Q. (By Mr. L. E. Lyon): All right. Where is the photograph, if you have it?

A. Wait a minute. Let me look.

Q. It is not in here.

(Testimony of William A. Doble.)

A. May I step down there, your Honor, and look for it?

The Court: You may.

Q. (By Mr. L. E. Lyon): You have handed to me a [3569] photograph, Mr. Doble, which is of a test cylinder having a large "A" on it, and I will ask you if that is the photograph to which you had reference.

A. Well, this is one of the photographs I had reference to.

Q. Now, what does this show with respect to any test?

A. It is of the half-cylinder of the test made with the 3½-inch Acme type of scratcher as represented by Defendants' Exhibit CI.

Mr. L. E. Lyon: Wait a minute.

I am not sure that I gave you the same half that he has (addressing Mr. Scofield). Pardon me.

The Witness: And I identify this cylinder by the black "A" which appears on the upper right-hand face of the cylinder.

Q. (By Mr. L. E. Lyon): And the photograph I have in my other hand, is that the other half of that same cylinder?

A. No. It is the same half, I believe, Mr. Lyon. No. It is the other half; that is correct.

Q. And that "A" was placed on there by whom, Mr. Doble? A. By me.

Q. You were present when the photograph was taken or when this cylinder was separated from the machine? A. Yes, sir.

(Testimony of William A. Doble.)

Q. And handed to the photographer? [3570]

A. I was present when the cylinders were taken apart and I observed the scribed lines which appear on the photographs which you have handed to me. I do not remember whether I was present when these actual photographs were taken, but I directed the taking of them, that is, I directed that they be taken.

Q. All right. Now, I hand you two other photographs.

Mr. L. E. Lyon: I will have this pair marked as Exhibits GI-1 and GI-2, being the two halves of the complete cylinder and used by Mr. Doble in that test.

The Court: They will be so marked.

(The two photographs referred to were marked Defendants' Exhibits GI-1 and GI-2, respectively, for identification.)

Mr. L. E. Lyon: Now, wait a minute. These are the 5½-inch sizes.

Q. I hand you two other photographs, Mr. Doble. Will you state what they are, upon which there has been erroneously marked "GI-1"?

A. The two photographs which you have handed to me illustrate the two halves of a larger cylinder, that is the cylinder in which the replica of the Acme type of a scratcher of 5½-inch diameter, Defendants' Exhibit CD-1, was operated.

Q. Now, these are the two halves of the same cylinder, are they? [3571]

A. Yes, sir.

(Testimony of William A. Doble.)

Q. And the "A" was placed on this larger cylinder by whom? A. By me.

Q. And you observed the tests of which this is a photograph? A. Yes, I did.

Mr. L. E. Lyon: I will ask that these two photographs be marked as Defendants' Exhibits GJ-1 and GJ-2.

You will have to re-mark over that one.

The Court: It is so ordered.

(The photographs referred to were marked Defendants' Exhibits GJ-1 and GJ-2, respectively, for identification.)

Q. (By Mr. L. E. Lyon): State whether or not these tests that you have conducted, as shown by these photographs, Exhibits GJ-1 and GJ-2 and GI-1 and GI-2, showed anything with respect to the rotation of the scratchers tested.

A. Yes, sir, they did.

Q. What did they show?

A. They showed that the scratcher rotated at the reversal point at top and bottom ends of the strokes.

Q. Was that the same or a different result from the tests that you found with respect to the other scratchers?

A. It was the same. They all operated the same, as far as I could see, excepting that some rotated a little [3572] better than the others. They all rotated. It is a matter of degree whether one rotated more or less than the others.

* * *

(Testimony of William A. Doble.)

Q. Now, Mr. Doble, I would like to have you take Exhibit No. 1 and the drawings and advise the angle which the scratcher wires make as shown and described in that application with respect to the tangent, and you have a protractor by which you can measure that. [3573]

* * *

Q. (By Mr. L. E. Lyon): Have you measured that angle, Mr. Doble? A. Yes, Mr. Lyon.

Q. What is it?

A. As close as I can measure it, the angle is 60 degrees

Q. And that is 60 degrees on the same side that Exhibit EJ, I believe it was, this model, was 25 degrees from the tangent, is that correct?

A. That is correct.

Q. EL, it was, instead of EJ. Pardon me. Correct the record. A. Yes, sir. That is correct.

Q. All right. Now, is there a disclosure in that application, by drawing or specification, of any other angle, Mr. Doble, than the one that you have just given?

A. There is not in the drawing. That is, the only angle, or an angle very closely related to 60 degrees is the only angle taught in the drawings of Plaintiff's Exhibit No. 1. As I remember from a reading of the specifications on the [3575] file wrapper, there is no mention of any other angle in this particular exhibit, Plaintiff's Exhibit No. 1.

Q. All right. Now, similarly, will you take Ex-

(Testimony of William A. Doble.)

hibit K and tell me in the drawings of the angles, and the specifications, if there is any variation in angle, what the angle shown and described in the Exhibit K for identification is, which was filed November 6, 1945?

A. I have measured the angle on page 15 of Defendants' Exhibit K and find the angle of the extending wires of the bristle to be as close to a true tangent as I could measure on the ends there.

Q. That is to say, on the drawings of Exhibit K, is there any angle other than the tangent as you have measured it? A. No. There is not.

Q. Is there any statement in the specifications of Exhibit K of any angle other than a tangent?

A. Not as I remember the specifications and the prosecution of the patent, Defendants' Exhibit K.

Q. Is it possible, Mr. Doble, looking specifically at Figure 3 of the drawings of Exhibit K, to determine at what angle the wires shown in Figure 3 make with respect to the tangent? A. No, sir.

Q. Why not. [3576]

A. Because there is not sufficient drawing included in Figure 3 to be able to read the angle, and, further, as the view was taken as a sidewise view and not looking down on top of Figure 3, it is impossible to read an angle from that figure.

Q. That is, it is impossible to tell an angle from an elevation or side view as to what it makes in a plan view, is that correct?

A. That is correct.

Q. Now, is there any statement in the specifica-

(Testimony of William A. Doble.)

tions of any kind—and you have read this application—of any angle other than a tangent—and I mean by “this application” Exhibit K?

A. Not that I can remember, Mr. Lyon.

Q. Now, similarly, I will ask that Exhibit 69 be placed in front of you, that is the file wrapper of Application 55,619—that is, I will place a copy of that application before you, of that file wrapper, and I will ask the same question with regard to the disclosure of the angle of that application. Have you measured the angle?

A. I have measured the angles of Figure 3 on page 2 of Plaintiff's Exhibit 69.

Q. Figure 3? A. Pardon me.

Q. Figure 3, did you say? [3577]

A. Figure 2. And on Figure 5, appearing on page 13 of Plaintiff's Exhibit 69. And in each case, as closely as I can measure the angle, it appears to be a true tangent.

Q. Now, what does the specification of that application say, does it disclose any angle other than a tangent—and I mean by “that application,” Plaintiff's Exhibit 69?

A. No, sir. It does not, neither by drawing nor do I remember any other angle mentioned in the specifications.

Q. Does this application teach to you as a mechanical engineer that there is any particular advantage obtained from a tangent or any unusual action obtained from a tangential position of the wires, Mr. Doble?

(Testimony of William A. Doble.)

The Witness: May I have that question read?

(Pending question read.)

Mr. L. E. Lyon: Let it be shown that by "this application" I mean Plaintiff's Exhibit 69.

A. The teaching to me as a mechanical engineer and from my experience in operating the several different types of scratchers is that there is no new or novel action obtained by means of a tangent relation of the wires as to some other angular inclination of the wires. The specifications and the arguments in this particular paper, Plaintiff's Exhibit 69, attribute certain factors to the tangent relationship which I do not believe are found.

Q. What portions of the specifications or arguments [3578] are you referring to, Mr. Doble?

A. I do not remember just where it is, but——

Q. Page 8?

A. Page 8, and I will call attention to line 12, commencing line 12 on page 8 of the specifications, which is a part of Plaintiff's Exhibit 69, which reads:

"When the casing is properly centralized this type scratcher produces complete scratching coverage since their unique mechanical operation during the reversing process causes them to crawl and walk around the hole. The spring mountings of the scratchers, due to rotation of the sleeves, change their position on the wall of the well with each reciprocation. This walking of the wires around the hole and rotation of the collars prevents the abrading ends of the whisk-

(Testimony of William A. Doble.)

ers from tracking up and down in the same place in the hole, thus providing complete coverage of the inner wall surface. The unusual mechanical action of the abrading wires has been determined by mounting a scratcher on a piece of pipe and reciprocating it within a pipe of larger diameter. As the scratcher is being run in a dummy oil well of this sort it has been noted that the whiskers are pointed upwardly in the same direction as the scratcher is lowered into the pipe. As the [3579] direction of the scratcher is reversed, the free ends of the wires hold their position against the inside of the pipe or well bore as they are rotated upon their coil springs as fulcrums. As the wires rotate in arcs passing from a relatively vertical to a horizontal position with reversal of the moment of the pipe, the scratcher sleeve or collar is caused to rotate upon the pipe relieving somewhat the tension on the wires."

Q. Now, what portion of that, Mr. Doble, don't you agree with or do you think is in error?

A. The portion that I think is in error is that that is a novel feature attributed to the makeup of the wires tangent to the body portion of the scratcher. The same action will take place, as I have demonstrated many times, where the scratcher wires have a sidewise inclination which is very much less than a tangent. The fact is, a relatively few degrees in sidewise inclination will cause the scratcher body to rotate around the casing and permit or enable the

(Testimony of William A. Doble.)

free ends of the scratcher wires to fully cover the surface of the well bore which is to be cleaned.

Q. Now, Mr. Doble, I would like to have you again refer to Exhibit K. Let me see Exhibit K for just a minute—and refer to pages 11 and 12 of Exhibit K, which are the claims which were originally filed with this application on November 6, 1945, and will you tell me, from the standpoint [3580] of mechanics, what is meant by this expression, “said whiskers projecting at an angle from the sleeve, simulating the trajectory of bodies thrown from the sleeve were the sleeve rotated rapidly.”? That is the last three lines of Claim 1 of the No. 627,013 application as filed.

A. That is a common definition for a true tangent which I think is taught in high school [3581] physics.

Q. That is an exact definition, is it not?

A. Yes, sir; it is.

Q. And does not permit of any real variation if so exact?

A. That is correct. That is the exact definition taught in the schools.

Q. Will you look at these remaining claims of the 627,013 application and tell me if it is not true that all of the remaining claims were made equally dependent upon that definition set forth in claim 1?

A. Yes, sir; they are all dependent claims and they all refer back to claim 1 as the basic claim.

Q. Now, Mr. Doble, claim 2 of that application defines the direction at which the coils of the springs

(Testimony of William A. Doble.)

extend in accordance with the disclosure of that application, does it not? Does it describe whether those coils extend radially or non-radially?

* * *

A. Claim 2 defines the axis of the coils as [3582] being substantially normal to the axes of the respective coil springs.

* * *

A. Excuse me. I had better repeat that answer. The axis of the coil springs is normal to any extended radius which extends through the body portion of the scraper body.

Q. (By Mr. L. E. Lyon): Well, what is that; is that radial or non-radial?

A. That is radial with respect to the body of the scratcher.

Q. And in that respect it corresponds with which one of these models which you had made, Mr. Doble?

A. It corresponds to Defendants' Exhibits CI and CD-1.

Q. Claim 3 of this application defines what, Mr. Doble?

A. Claim 3 defines—I might as well read it; it is very short.

“A scratcher as in claim 1 in which radial studs within the sleeve provide fastening means for the wire whiskers.”

Q. And you have Exhibit A before you?

A. No, sir, I do not.

Q. Will you get it, please, before you, Exhibit A?

(Testimony of William A. Doble.)

I place before you Exhibits A and A-1, and can you point out from these exhibits what is defined there as radial studs? [3583]

A. The radial studs referred to in claim 3 of Defendants' Exhibit K are the same in structure and mode of operation as the radial studs which appear in the illustration in the upper right-hand corner of Defendants' Exhibit A, and likewise in the illustration, Defendants' Exhibit A-1. They are the studs about which the anchored ends of the wires are fastened to retain the whiskers in the scratcher structure.

Q. I hand you Exhibit CI for identification and ask you to point out from that exhibit what the radial studs are.

A. The radial studs are the series of studs which extend inwardly from the scratcher body, about which the scratcher wires or whiskers are coiled and fastened by the head of the radial studs, and the opposite end of the radial stud projects through the body portion of the scratcher and is riveted over to fasten the radial stud securely within the body member. The radial studs project through into the interior of the scratcher body and about which the loops of the coils, that is, the coils of the scratcher wires, are wrapped and firmly held in position on the scratcher body.

Q. Now, Mr. Doble, will you refer to claim 6 of this application, Exhibit K, and tell me what structure that claim defines?

A. Claim 4 reads:

"A scratcher as in claim 1 in which a circumferential row of studs within the sleeve [3584] posi-

(Testimony of William A. Doble.)

tioned intermediate parallel rows of holes through which the whiskers project provide fastening means for the wire whiskers."

The claim has been corrected in some respects. It is difficult to read those corrections here as they do not appear.

Q. I just wanted it as originally filed, without the corrections, Mr. Doble.

A. I read it as originally filed.

Q. Oh, I see. Now referring to Exhibits A and A-1 can you tell me what that defines as shown by these exhibits?

A. Yes, sir.

Q. What does it define?

A. It defines a row or a circumferential row of studs within the sleeve, that is, the scratcher body. We have the row of studs inside, positioned intermediate parallel rows of holes. The studs, as I have pointed out, within the scratcher body are positioned between two series of holes which are pierced through the scratcher body adjacent the upper and lower faces of the scratcher body.

Q. Does that definition read precisely upon the structure as illustrated in Exhibits A and A-1?

A. Yes, sir; it does. It is identical. You have the row of circumferential studs positioned between the two rows of holes which are pierced through the body portion of the scratcher. [3585]

Q. Now, claim 5, what does it add to that definition, if anything, Mr. Doble?

A. Claim 5 reads:

"A scratcher as in claim 1 in which a circumfer-

(Testimony of William A. Doble.)

ential row of studs within the sleeve positioned intermediate parallel rows of holes provide fastening means for the wire whiskers, a single whisker passing through adjacent holes in each row and a pair of whiskers attached to each stud.”

That adds to the previous claim that each stud is employed to fasten the end of two of the whisker wires, that is, under the head of each of those studs there is wrapped the fastened end of each of the wire whiskers, and the wire whiskers in turn project outwardly and then through the appropriate openings in the bore provided in the scratcher body.

Q. And is that definition true of Exhibits A and A-1, Mr. Doble?

A. Yes, sir; in exactly the same way we find the series of studs, the series of holes above and below the studs. In each case each stud is employed to fasten two of the scratcher wires or whiskers to the body portion of the scratcher body. As shown in Defendants' Exhibits A and A-1 each stud fastens two of the whiskers to the body portion.

Q. In the respects pointed out, Mr. Doble, is there [3586] anything disclosed in this or defined by the claims of the 627,013 application which was filed in the Patent Office on November 6, 1945, that was not found in the advertisement in Exhibit A?

A. No, there is nothing found in Exhibit K which is not likewise found in the same manner and operating in the same way in Defendants' Exhibits A and A-1.

(Testimony of William A. Doble.)

Q. There was matter added to the application serial No. 627,013, Exhibit K, which was not found in the Exhibit 1, 388,891 application. What was that added matter, Mr. Doble?

* * *

Q. (By Mr. L. E. Lyon): Point out to the court what the added matter was so it will be evident.

A. Did you refer to Exhibit 1, Mr. Lyon, the application 388,891?

Q. Yes, I did, Mr. Doble.

A. Well, there is added matter to Plaintiff's Exhibit 1, [3587] which is, namely, the positioning of the wires, that is, the free ends or the extended ends of the wires, at an angle different from the tangent. They extend outwardly, you might say, radially.

Q. I think you got it the wrong way. I said what was added to 388,891 by 627,013. You are going backwards.

A. Yes. The tangential relation of the wires, and also the inside stud mounting which we have referred to as the row of studs or rivets extending around the inside of the scratcher body to which the ends of two of the scratcher wires are fastened so as to permanently mount the scratcher wires to the scratcher body.

Q. As I understand your testimony as to that matter, it was all common to the advertisement of July 7, 1941, Exhibit A, is that correct?

A. Yes, sir; that is correct.

(Testimony of William A. Doble.)

Q. Now if you will return to Figures 4, 5, and 6 of the 627,013 application?

Mr. Scofield: Exhibit K?

Mr. L. E. Lyon: Exhibit K.

You will find, will you not, a different form of coiled spring?

A. Yes, sir. That is on page 15 of the drawings there is a different type of coil.

Q. What type of coil is that? [3588]

A. That is the type of coil referred to here as a conical coil.

Q. How is that conical coil illustrated by, or is it illustrated by Exhibit EK, Mr. Doble?

A. Yes, sir.

Q. How many turns is there on the conical coil as shown in the drawings, Figures 4, 5, and 6?

A. There appear to be four in Figure 6; I guess it may be also four in Figure 4; but in Figure 5 you cannot determine how many coils there are.

Q. How many are there in this physical model that was presented to you?

A. In Exhibit EK there are four coils.

Q. I place before you Exhibit CV-1 and ask you, within the definition of a conical coil, if that structure shows a wire with a conical coil in it, Mr. Doble?

A. Yes, sir; it does.

Q. How many turns are there in that conical coil?

A. There appear to be two, probably two and one-half.

The Court: What is the last exhibit?

(Testimony of William A. Doble.)

The Witness: CV-1, your Honor; that is "V" like in "value." [3589]

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, I place before you Exhibit EF and ask you what kind of spring coils there are in that exhibit.

A. The spring coils in Defendants' Exhibit EF are conical coils.

Q. At approximately what angle do the wire fingers or abrading wires extend from the collar or from a position adjacent the collar, Mr. Doble?

A. Approximately tangent.

Q. How does that model, Exhibit EF, correspond with the disclosure of Figure 5 of the 627,013 application?

A. In the respects we have mentioned, they are substantially the same, that is, Figure 5 discloses conical coils, Figures 5 and 6 taken together, and the free ends of the wires are substantially tangent to the collar or body portion of the scratcher.

Q. Now, Mr. Doble, I will ask you to refer to Exhibit 69, that is the file wrapper of the 55,619 application, and particularly to the pages on the bottom of the photostats which are numbered apparently in pencil 76 and 77——

A. Yes, sir.

Q. ——and I want you to read the definition made by Claim 23 as it appears on page 76, and compare that definition with the structure, Exhibit I, as the same as shown in Jones and Berdine—I mean Figure 26 of Exhibit X, as that [3590] structure is

(Testimony of William A. Doble.)

illustrated by Exhibit IIII, which I place before you.

A. Which claim did you refer to, Mr. Lyon?

Q. 23.

* * *

A. Reading Claim 23, which appears on page 76 of Plaintiff's Exhibit 69:

“In combination with a well casing, a support rotatably mounted on the exterior of said casing, stiff wire whiskers each flexibly attached at [3591] one end to said support and each projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the radius of the support drawn to said projection point of the particular whisker, and all in substantially the same angular relation with the support.”

I find in Defendants' Exhibits IIII and CF the first part of the—that is the title, really, or the environment of the invention, “in combination with a well casing.” Exhibit CF is a replica of a well casing.

The next phase of the claim or element of the claim calls for “a support rotatably mounted on the exterior of said casing.” The support in this case—and in this case I am referring to Defendants' Exhibit IIII—is the body portion of the scratcher element.

Q. (By Mr. L. E. Lyon: That is what we have referred to as the collar of the scratcher?

A. As the collar or sleeve of the scratcher, and

(Testimony of William A. Doble.)

that collar or sleeve of the scratcher is rotatably mounted on the well casing.

Q. Proceed.

A. The next element specifies, "stiff wire whiskers each flexibly attached at one end to said support." The stiff wire whiskers I am pointing to and are designated H-1 and H-2 on Defendants' Exhibit IIII, that is, at least two [3592] of the wires are so indicated.

There are a plurality of 30 wires in this particular embodiment of the scratcher as shown in the Jones and Berdine report, that is Figure 26 of that report which is Defendants' Exhibit X.

Q. Proceed.

A. "* * * and each"—that is now referring to these wire whiskers—"each projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the radius of the support"—as we can see by viewing the wires of Defendants' Exhibit IIII, the effective angle of inclination is sidewise with relation to a true radius to the center of the scratcher body.

Q. Proceed.

A. "* * * with respect to the radius of the support drawn to said projection point of the particular whisker, and all in substantially the same angular relation with the support."

As we note by viewing Defendants' Exhibit III, all of the wire whiskers are, substantially all have substantially the same angular relation to the body portion of the scratcher.

(Testimony of William A. Doble.)

Q. Now, Mr. Doble, this application, Exhibit K, gives you a determination of when a scratcher rotates, is that correct? [3593]

A. I don't believe I understand your question.

Q. Well, the application, Exhibit 69, in the specification tells you how to determine that a scratcher is rotated, does it not? A. Yes, sir.

Q. Do you precisely follow that method in determining when a scratcher like Exhibit IIII is rotated?

A. Yes, sir, with the additional precaution, so that the human element would be eliminated, from any attempt to rotate the scratcher.

Q. That is, you use a square shaft?

A. Yes.

Q. To be absolutely certain that nothing could happen to influence the rotation, is that it?

A. Yes, sir.

Q. And that is the only reason you used a square shaft? A. Yes, sir.

Q. Now, will you take Claim 24 of this application Exhibit 69, as it appears on page 76 of Exhibit 69, and read that and make the same comparison?

A. Reading Claim 24 as follows:

"In well cleaning equipment, a casing reciprocable in the bore of a well, a support rotatably mounted on the exterior of said casing, stiff [3594] wire whiskers each flexibly attached at one end to said support, and each projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the

(Testimony of William A. Doble.)

radius of the support drawn to said projection point of the particular whisker and all in substantially the same angular relation with the support, the free ends of said whiskers being of a length to frictionally contact the well wall and abrade its surface upon reciprocation of the casing, said whiskers upwardly inclined on the downstroke and downwardly inclined on the upstroke of the casing and upon reversal of the casing travel adapted to fulcrum both at their points of contact with the well wall, and substantially at their points of attachment with the support whereby vertical movement of the casing after each reversal rotates the support on the casing, thereby relieving bending stress on the whiskers and shifting the whiskers circumferentially upon the well bore to contact and abrade a different area upon each casing reciprocation.”

Applying the claim to Defendants’ Exhibits IIII and CF, we find we have here, and I am holding in my hand, a simulated well cleaning equipment, the well cleaning equipment is represented by the scratcher, Defendants’ Exhibit IIII; [3595] “a casing reciprocable in the bore of a well”; I am holding in my hand the casing, a simulation of a casing which could be or would be reciprocable in the bore of a well, and that designated as Defendants’ Exhibit CF.

“A support rotatably mounted on the exterior of said casing.” The support is the body portion, the sleeve, the collar, or whatever we choose to call it, of the scratcher element, and, as I am demonstrat-

(Testimony of William A. Doble.)

ing, I can freely rotate the scratcher collar or support or sleeve on the simulated well casing, Defendants' Exhibit CF.

"Stiff wire whiskers each flexibly attached at one end to said support." We will observe that there are a number of stiff wire whiskers, 30 of them, in fact, each flexibly attached by means of the torsion spring which was explained by Mr. Wright in his testimony, each of the wire fingers is flexibly attached to the wire support, at one end attached to the—"attached at one end to said support," and the one end of the stiff wire whisker is attached to the support by the outturned end which passes through one of the clips on the body portion.

It further defines that each of these stiff wire whiskers is to have an angular inclination, having sidewise direction with respect to the radius of the support. As I have already testified before, if we assume a line which passes through the center of the tubing, it is clear to [3596] observe that each of the stiff wire whiskers has a sidewise inclination with relation to the body portion of the scratcher collar, or the support as it is defined in the claim.

And all of the whiskers are inclined in the same direction with relation to the supporting body.

Q. I suggest that you take a piece of paper, Mr. Doble, and lay it down on where you are reading, so you do not lose your place.

A. The next, "the free ends of said whiskers being of a length to frictionally contact the well wall

(Testimony of William A. Doble.)

and abrade its surface upon reciprocation of the casing." We have pointed out at various times in the testimony so far, and the cylinders I have prepared demonstrate, the manner in which the stiff wire whiskers engage the surface of the well bore and during that engagement remove the mud from the well bore.

"Said whiskers upwardly inclined on the downstroke"—when the casing is being run into the well, because the lengths of the wires extend out beyond the diameter of the well bore, and they are pushed upwardly as I am doing with my finger on one of the whiskers, I am pushing it upwardly.

Q. Upwardly on what?

A. Upwardly on one of the stiff wire fingers.

Q. Of what exhibit? [3597]

A. Of Exhibit IIII, until the end of the wire will ride on the inner surface of the well bore and be of substantially the same diameter as it passes down the surface of the well. Of course I have demonstrated one, but the same thing would result with all of the stiff wire fingers, they would all bend upwardly during the downstroke of the casing as it is run into the well.

Then it defines that the wire whiskers will be inclined downwardly as the casing is reciprocated upwardly during a cleaning operation, so as to bring the free ends of the wires into register with the bore diameter so as to clean the surface.

"And upon reversal of the casing travel adapted to fulcrum both at their points of contact with the

(Testimony of William A. Doble.)

well wall and substantially at their points of attachment with the support whereby vertical movement of the casing after each reversal rotates the support on the casing, * * *'' if we assume that the scratcher is being run into the well along with the lowering of the casing or running of the casing into the well——

Q. We do not have to assume that. That is what is done, isn't it?

A. That is what is done, and we reach the bottom of the stroke. The casing is then moved upwardly to reciprocate the scratchers. The first upward moving of that casing does [3598] not cause a corresponding movement of the scratcher. The wires are in firm engagement during that period with the wall of the well bore and lock the support or scratcher against the vertical movement until the lower stop collar, which is on Defendants' Exhibit CF, engages the bottom-edge surface of the support of this scratcher and causes upward movement of the scratcher in the well, at which time the wires which are inclined upwardly will be forced into greater contact with the well bore and as a result will pivot or fulcrum about the point as the scratcher is being moved upwardly.

As we will remember, on the downward stroke or on the upward stroke, the bristles, all the wires had to be moved upwardly or downwardly to bring them in register with the well-bore diameter. So that if they are allowed to stand out straight as they are in Defendants' Exhibit IIII, the wires

(Testimony of William A. Doble.)

would be longer than the diameter of the well bore, that is, the diameter across the wires would be greater than the diameter of the well bore, and the wires would have to be bent inwardly, or the ends of the wires would have to pierce the wall of the well bore.

In passing through that reversal, the wires, instead of piercing the well bore, caused rotation of the scratcher to accommodate the difference in the length. [3599] And then after—that is, that swinging or pivoting of the wire will take place from its upper position during the downstroke until it reaches its neutral position, which will be horizontal as I am now holding Defendants' Exhibit IIII. Thereafter the finger is freed and will find a new path or hunt to a new path and travel up a new path during its reciprocation in the well bore. In that way, on each reciprocation the fingers hunt, the collar or support is rotated, the fingers hunt a new location and scratch a new area of well bore surface. And that is what is meant by that portion of the claim which I have just read.

And reading further:

“Thereby relieving bending stress on the whiskers and projecting the whiskers circumferentially upon the well bore to contact and abrade a different area upon each casing reciprocation.”

In the manner as I have pointed out.

Q. Mr. Doble, will you take claim 31 now and make the same comparison?

(Testimony of William A. Doble.)

A. Reading from claim 31, which appears on page 77 of Plaintiff's Exhibit 69, I will read claim 31 as follows:

"A well bore cleaning scratcher adapted to be rotatably mounted on a well casing comprising an annular support, stiff wire whiskers, each flexibly attached at one end to said support and each [3600] projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the radius drawn to said projection point of the particular whisker and all of said whiskers projecting in substantially the same angular relation from said support."

That is the end of the claim and now I will apply claim 31 to defendants' Exhibits IIII and CF. "A well bore clearing scratcher adapted to be rotatably mounted on a well casing comprising"—

I have pointed out before the well bore cleaning scratcher as including Defendants' Exhibit CF. And, as I pointed out before, the scratcher is adaptable to be and is rotatably mounted upon the well casing. The well casing is Defendants' Exhibit CF. And, as I swing the scratcher around it is freely rotatably mounted on the well bore casing.

The cleaning scrtacher is to comprise an annular support. The annular support is the body portion of the scratcher element.

"Stiff wire whiskers"—as I pointed out before, there are 30 stiff wire whiskers mounted on the support. Each wire whisker is flexibly attached at

(Testimony of William A. Doble.)

one end to said support. As I pointed out before, each of the wire whiskers is flexibly attached to the support.

“And each,” that is referring to “each wire whisker [3601] projecting from a point on the periphery of the support at an angular inclination having sidewise direction.”

As I pointed out before, each of the wires extends from a point on the body portion or support for the scratcher and has a sidewise inclination. That sidewise inclination is with respect to the radius drawn to said projection point of the particular whisker.

“And all of said whiskers projecting in substantially the same angular relation from said support.”

As I pointed out before, all of the wire whiskers have the same bend and extend from the support in the same direction. [3602]

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, is it possible to see whether or not a scratcher rotates on a casing during the operation of placing cement in a well bore cementing operation? A. No, sir.

Q. Is it common in the mechanical arts to simulate an operation to determine what is happening under such conditions when they cannot be observed optically?

A. Yes, sir; it is. That is common practice.

Q. Is the test just suggested in the Hall application Serial No. 55,619, Exhibit 69, and in the Hall

(Testimony of William A. Doble.)

application, Exhibit K, Serial No. 627,013, a fair test to determine such an operation of rotation when it is not observable optically?

A. Yes, I would say so. That would be a rough test. [3603] A better test would be those which we made, which eliminate the human element which might influence rotation. Basically, they are the same.

Q. Mr. Doble, you have made a comparison of claims 23, 24, and 31 with the structure of figure 26 of the Jones and Berdine report. I would ask you to state whether or not the comparison which you made with the Jones and Berdine Figure 26 structure applies equally to the structure of the wall-cleaning guide of Exhibit 104?

A. Yes, sir; it does.

Q. Mr. Doble, the claims 23, 24, and 31 each call for sidewise direction. Is it possible from those claims, any one of them, to determine what the degree of sidewise direction is that is specified in those claims?

A. No, sir. There is no definition of the amount nor extent of sidewise inclination.

Q. If we refer to specification of the 55,619 application, Exhibit No. 69, is there any definition of "sidewise inclination" given in that application other than "a true tangent"?

A. You are referring to Plaintiff's Exhibit 69, Mr. Lyon?

Q. 69. My question is this: If we take "side-

(Testimony of William A. Doble.)

wise direction" as used in Plaintiff's Claims 23, 24, and 31 and seek to determine what that sidewise direction is from the [3604] specification in that application in which they appear, is there any definition or key given other than tangential?

A. No, sir; that is the only teaching in the patent as to the angular relation of the wires with respect to the body portion of the scratcher.

Q. Now, Mr. Doble, would sidewise inclination (or sidewise direction) include, as it is used in claims 23, 24, and 31, any angular inclination of the entire 90 degrees between a true tangent and a true radial extent of the wires?

Mr. Scofield: Would you read that question, please?

(First portion of question read by the reporter.)

Mr. L. E. Lyon: And include "or sidewise direction." Put them both in.

(Question read by the reporter as amended.)

A. Yes, sir; that is correct.

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, as a mechanical engineer and viewing the Jones and Berdine report as a [3605] publication, is it or is it not obvious as to how the scratchers of Figure 26 were mounted upon the pipe or casing?

A. It is obvious to me that the scratchers are

(Testimony of William A. Doble.)

mounted on the casing between two stop lugs and is free to reciprocate between those stop lugs.

Q. And being free to reciprocate between those stop lugs, is it also obvious as to any other operation that takes place?

A. Yes, it will be free to rotate. There is no teaching in the Jones and Berdine report that the scratcher body is prevented from rotation; and being free to reciprocate, it would be free to rotate unless special provision was made to prevent rotation, which the Jones report does not teach.

Q. Mr. Doble, you are familiar with mechanical operations; in fact, have operated and have now a machine shop of your own, have you not?

A. Yes, sir.

Q. Is it correct to say that one of the most difficult of machine operations is to prevent a rotation between a structure like that shown in figure 26 of the Jones and Berdine publication?

A. You mean while it is being operated in a well?

Q. Yes.

A. I think if you tried to keep it from rotating you [3606] might have difficulty unless you provided a special means that would rotate.

Q. Is it or is it not obvious to you that if it was held so that it did not rotate, that such means would have to be and would be specifically defined by the author?

A. Yes, that is what I would expect.

(Testimony of William A. Doble.)

Q. Isn't that true of most mechanical publications that you have read?

A. Yes, that would be one of the controlling features in its operation.

The Court: In your opinion——

The Witness: In my opinion, yes.

The Court: ——would it state the operation to be held rigid?

The Witness: Yes, your Honor, and perform the operation just as well. Now, I would say, for example, let us take Defendants' Exhibit IIII mounted on Defendants' Exhibit FFFF. If we should weld the support or body portion of the scratchers to the simulated casing and lowered the casing or ran the casing into the well to the area you wished to clean, and then reciprocated the casing up and down through the area to be cleaned, the wires would on each stroke remove mud cake. It would be advantageous to rotate the entire casing a little bit for each rotation so that the fingers would hunt out a new path and scribe the scratch of [3607] fresh mud off of the surface of the wall.

The Court: As I understand it, in your opinion, unless the scratcher is rigidly mounted on the casing it will rotate?

The Witness: Yes, your Honor.

The Court: There are only two ways, then, to control the rotation; and one is to make it rigid and the other is to provide means to permit a certain mode of operation?

The Witness: Yes, that is true, your Honor. In

(Testimony of William A. Doble.)

the plaintiff's construction in their advertising they say in certain cases to weld the scratcher to the casing, and in that case, actually, you would rotate as well as reciprocate. And there are on the market today, as we have the exhibits here of the purely rotating type of scratchers. They are mounted on the casing. They do not rely on reciprocation. They are welded to the side of the casing, strips are welded to the side of the casing which have the spring fingers mounted on them. There may be three of them around the circle of the casing, and that casing is rotated. And the advantage claimed by that is that once they lowered the casing to the position, when they want to cement it, then they do not have to move the casing from that said position. Merely by rotating them they can clean the surface of the well bore, preparing that surface there for cementing or for production.

The Court: The springs will force the scratcher up and [3608] down.

The Witness: No. The springs, they do not move up and down. They just go down a circular path, but there are a sufficient number of them and they are mounted in staggered relation about the periphery of the casing so the free ends of the wires cover the entire surface of the well bore.

The Court: Probably cover the surface?

The Witness: Yes, your Honor.

The Court: There are probably several ways of doing that?

The Witness: Yes, your Honor.

(Testimony of William A. Doble.)

Q. (By Mr. L. E. Lyon): That is, the scratchers you have reference to, Mr. Doble, are exemplified by BU, which is the B & W rotating scratcher, and the Exhibit DT, which is the Halliburton Oil Well Cementing Rotation Scratcher, is it not?

A. Yes, sir; that is correct, and which has the fingers mounted so the ends will sort of hunt around the surface, to continue to scratch that surface and clean the well bore.

Q. Mr. Doble, there has been some statement here with reference to the coiling of the wires in a scratcher of this type of Exhibit CV-I (1), and I will hand you a scratcher wire from that.

The Court: CV-1.

Mr. L. E. Lyon: -1, which is Exhibit CV-2, and if [3609] those wires of such a scratcher element are to come out from the collar to the same diameter or the same radius, is it possible for the structure to be made, as those wires are mounted in the collar, with the wire lengths precisely the same from the collar to the outer end?

A. No, sir.

Q. Why?

A. Because there are several factors. First of all, we want the over-all diameter of the scratcher to be of a certain diameter. Now, if one of the scratcher wires projects from the surface of the scratcher body at a slightly different angle—and practically all of the scratcher wires are at a slightly different angle than the others due to the manufacture—there is no reason for them to be precise

(Testimony of William A. Doble.)

instruments of manufacture—therefore, for every change in angle there will be a different length of wire because that length of wire, as you can see, extends up now above the wire adjoining it. In order to make the circle that would include all of the wires, the wire that I am now bending would have to be cut off and as soon as you cut that wire off, then the length of the wire projecting from the surface of the body would naturally be shorter.

And then there is another factor. The coils are made so that on the machine they are rough manufacture. Some of the coils extend through the holes or openings in the collar [3610] sleeve to a greater or less extent. In some of those scratchers that is very pronounced. Here, for example, is one where the coil of the scratcher is considerably below the surface, and shortly from that there is—well, take here, for example, the top of the coil is practically flush with the surface of the collar. Those two wires' lengths would have to be different in order that the over-all outer diameter would be the same. And that, I think, you will find in comparing these wires, that none of these wires are the same length.

Take, for example, the two I am now pointing to. If the wires are the same length, then one wire is going to engage in the wall and the other is going to miss it. So in order for the wire that is closest to your Honor to engage the wall it would have to be made longer than the wire which I now have engaged with my finger.

(Testimony of William A. Doble.)

So it is not material. I don't think it makes any difference whatsoever as to the length of the wires, provided that the over-all diameter is the diameter that you want and that is the one that is obtained, that may be obtained by making one wire longer than the other. But by doing so, you attain the projection having these wires of a length that will properly engage the surface of the well bore.

Q. Mr. Doble, these holes in Exhibit CV-1, there are two rows, an upper and lower row the way I am holding it. [3611] Those rows are in what is called staggered relation, are they not?

A. Yes, sir; that is correct.

Q. And that staggered relation requires in order for one scratcher wire with two fingers on it, that the scratcher wire be placed in an inclined relation inside of the collar, does it not?

A. Yes, sir; that is correct.

Q. If the wires, therefore, come out to the same extent in the same direction on the outside of the scratcher, one wire must make with the connecting portion of that wire structure an obtuse angle while the other makes an acute angle, does it not?

A. Yes, sir. That is clear on Defendants' Exhibit CV-2. The wires are of somewhat different length; or, if they are the same length, the ends would not extend out the same distance from the sleeve as is desired to have both of the ends of the wire engage the wall surface.

The Court: It is the same problem mechanically

(Testimony of William A. Doble.)

that the manufacturer of a broom or a brush would encounter, isn't it?

The Witness: Yes, sir. Yes, your Honor.

Q. (By Mr. L. E. Lyon): Now, Mr. Doble, will you describe to the court the disclosure, giving us a thumbnail sketch of the disclosure, of the '317 patent, Exhibit 38, [3612] that is the Wright patent, Exhibit 38, the apparatus patent, and describe how, if it does, that patent finds its counterpart in the different exhibits which have been referred to.

Mr. Scofield: Now, your Honor, I don't believe there is a necessity for another thumbnail sketch of the '317 patent.

Mr. L. E. Lyon: We have not had one yet. We have had it of the method patent.

The Court: What would be the purpose of that?

Mr. L. E. Lyon: The purpose, your Honor, is to set before the court how that patent finds its counterpart in the structures of the plaintiff and the defendant in this action. And that was the question which I asked.

Mr. Scofield: We will stipulate that it covers the 104 wall-cleaning guides, if that is any help to you.

Mr. L. E. Lyon: I will accept that stipulation. That will shorten it. We can proceed from there to eliminate the 104 patent structure. [3613]

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, will you take the Wright patent, Exhibit 38, and compare

(Testimony of William A. Doble.)

that disclosure with the structures of the Jones and Berdine scratchers, the Weatherford scratcher as shown for example by Exhibit EJ, I believe that is the one on the end here, or No. 40, and I think the witness has the other one on the stand there. That is the one I want, Exhibit CV-1, the Multiflex scratcher of Exhibit 57—and I will put Exhibit 57 in front of you—and the Nu-Coil scratcher Exhibit 72? [3616]

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, you have placed before you certain exhibits which are illustrative of the different forms of scratchers. Will you just state for the record what those exhibits are?

A. Yes, sir. The first exhibit is the scratcher, in physical form, identified as Defendants' Exhibit IIII, which is mounted upon the simulated portion of a well casing, Defendants' Exhibit CF.

The next exhibit comprises a scratcher identified as Defendants' Exhibit EC, which is mounted upon a section of well casing identified as Defendants' Exhibit ED.

The next exhibit is Defendants' Exhibit No. CK. And the next exhibit is Defendants' Exhibit EJ. And the next exhibit is Plaintiff's Exhibit 72. And the last exhibit is Plaintiff's Exhibit 57.

Q. All right. Now, you also have before you Exhibit 8? A. Yes, sir.

Q. The question that was left before you: Will you take and make a comparison of the disclosure

(Testimony of William A. Doble.)

of Exhibit 8 [3625] with these different scratcher exhibits which you have just identified, taking them in turn, Mr. Doble?

A. I have before me the exhibits which I have enumerated, which represent five different types or styles of wall-cleaning guides or scratchers. The scratchers which I have before me do not serve a useful purpose until they are mounted upon a well casing and run into the well and operated.

As, for example, in Defendants' Exhibits IIII and CF, we have one of the scratchers mounted upon a simulated portion of well casing. The same is true with Exhibit CE, which is mounted upon a simulated wall (well) casing ED. All of the scratchers which I have before me would be similarly mounted on a wall (well) casing; that is, they not only will be mounted on the casing but they will be permanently mounted on the wall casing—on the well casing, and they are to be permanently installed in the well bore at the completion of the cementing or conditioning of the well.

So that we have before us, as I pointed out, the same type of instrumentality which is used for the purpose of removing mud cake from the particular zone in the well which is to be conditioned for either cementing or production.

Each is to be mounted upon a tubular casing which is lowered into the well and operated in the selected zone to clean the well bore. [3626]

Now, each of the scratchers which I have before me and have identified by Exhibit number is

(Testimony of William A. Doble.)

mounted on the casing or secured to the casing in a particular manner. As, for example, in the combined Exhibit Defendants' Exhibits IIII and CF, the scratcher or sleeve of the scratcher is securely fastened upon the casing between two spaced stop rings in such manner that the sleeve of the scratcher may freely reciprocate and rotate with relation to its securing means which securely fasten it to the casing.

The same is true with Defendants' Exhibit combination including Defendants' Exhibits EC and ED.

In like manner Defendants' Exhibit CK, which has been referred to as a wall-cleaning guide, is securely fastened to the casing between either stop rings, as illustrated in Defendants' Exhibit CF, or stop lugs as they appear in Defendants' Exhibit ED. Either way of mounting the scratcher on the casing or tubular casing string is a matter of election or option by the operator or driller who is to progress the string of drill pipe into the well bore.

In the same manner Defendants' Exhibit EJ may be mounted between stop rings or stop lugs, or may be welded to the casing as called for in the Weatherford advertising literature. Defendants' Exhibit EJ is a Weatherford-type of [3627] scratcher.

Defendants' Exhibit or Plaintiff's Exhibit C-2, which is a Nu-Coil type of scratcher made by the B and W company, would normally be mounted or secured to the casing between stop lugs or stop rings as may be selected by the driller.

The same is true of Plaintiff's Exhibit No. 57

(Testimony of William A. Doble.)

which is the Multiflex-form of scratcher made by the B and W company.

So that we find all of the scratchers which I have before me arranged, and are securely mounted, on the casing before it is run into the well bore.

Having the scratchers mounted on the casing, the casing is then run into the bore and is reciprocated in the area to be cleaned.

Now, the patent '317 deals with the particular——

Q. Exhibit 38.

A. Exhibit 38 deals with the particular form of scratcher construction. The scratcher is to have a plurality of scratching or abrading fingers.

I will point out in Defendants' Exhibit IIII the series of plurality of abrading fingers, which are of stiff spring steel and are equally spaced around the periphery of the sleeve which forms the body portion of the scratcher.

In Defendants' Exhibit EC, we find the same scratching elements or fingers, and I will call attention to one portion of the sleeve part of Defendants' Exhibit EC from which the guide bars or clips have been removed, so that the spring [3628] fingers with their attaching shanks can be observed more clearly in the manner that each of the shanks of the spring fingers is mounted upon the sleeve of the scratcher body.

In the same way, Defendants' Exhibit CK is provided with a plurality of spring wire abrading fingers which are equally spaced around the periphery of the sleeve of the scratcher and are ar-

(Testimony of William A. Doble.)

ranged, that is, the free ends of the wires are arranged to engage the wall surface of the well bore that is to be cleaned.

The Court: Does the record show whose device that is?

The Witness: Yes, your Honor. That is the device made by the B and W company. It is Exhibit CK, wall-cleaning guide made by the B and W company.

Defendants' Exhibit EJ is a Weatherford scratcher and it includes a plurality of spring steel wire abrading or scratching fingers or elements, the free ends of which are so related to the structure as to engage and abrade the surface of the wall to be cleaned.

The same is true with Plaintiff's Exhibit 72, wherein it may be observed a plurality of spring steel abrading fingers or scratching fingers which are of such length as to enable the free ends of the scratcher fingers or wires to scratch the wall surface of the well bore where the mud cake is to be removed from the well bore.

The same is true with Plaintiff's Exhibit 57, which is [3629] defendants' wall-cleaning guide, and the wall-cleaning guide includes a plurality of spring steel wire abrading fingers for scratching the surface of the well bore during the cleaning operation, and the lengths of the fingers are so related to the structure as to engage the side walls of the well bore in the area to be cleaned.

Another important feature, as defined in Plain-

(Testimony of William A. Doble.)

tiff's Exhibit 38, the patent to Wright, '317, is the manner in which the spring fingers are mounted upon the sleeve of the scratcher body.

Referring again, first, to Defendants' Exhibit IIII, which is a replica of the Figure 26 of the Jones and Berdine report, Defendants' Exhibit X, we will observe that each of the fingers, that is, the spring steel abrading fingers, is mounted on the sleeve forming the body portion of the scratcher in such a manner that the fingers may swing longitudinally with relation to the sleeve portion of the scratcher body.

The particular mounting is more clearly observed in Defendants' Exhibit EC, which likewise is a replica of the Figure 26 of the Jones and Berdine report, Defendants' Exhibit X.

The spring fingers or abrading fingers are yieldably mounted on the sleeve portion of the scratcher body, by having one end of each of the spring fingers projecting [3630] outwardly in a radial direction to pass through a properly-sized opening in one of the guide bars or clips which confine all of the fingers to the body portion of the scratcher.

From the point of attachment to the clip or guide bar, the scratcher finger is provided with a relatively long arcuate section which follows around the periphery of the sleeve portion and finally extends at a sidewise inclination from the sleeve around a radius and then the scratcher finger extends more or less radially a portion of its length,

(Testimony of William A. Doble.)

and then finally is given a sidewise inclination of about 30 degrees.

Q. (By Mr. L. E. Lyon): Well, Mr. Doble, that manner of securing what you call the arcuate section of the scratcher finger on the outside periphery of the body, that performs two functions, does it not? A. Yes, sir.

Q. And what are those two functions?

A. The first function, the most important, I would say, is that it provides a torsion spring section or a spring section or a yieldably mounted section in the finger structure, so that, during the reversal of the scratcher within the well bore, the fingers may freely yield without distorting the finger structure.

Q. Now, Mr. Doble, in this Exhibit EJ we have previously discussed this inside stud [3631] mounting.

A. Yes, sir, we have.

Q. Now, the spring fingers in this structure have a section which extends on the inside of the sleeve, passes around that stud, and has an eye, and that eye holds that spring, does it not, or does it, in a manner similar to the upturned end of the spring wire which passes through the hole in one of the clips on Exhibit IIII?

A. No, sir. On Exhibit EC.

Q. Is that true?

A. Yes, sir, that is true.

Q. And that eye on the inside of this collar follows the inner periphery of that collar, does it not?

A. Yes, sir, it does, to a certain degree. The eye

(Testimony of William A. Doble.)

you are referring to is the eye by which that particular abrading finger is securely mounted to the inside surface of the sleeve.

Q. Well, that is what we have called the inside stud.

A. And that is called the inside stud or inside mounting, as it is commonly referred to in this art.

Q. Now, is it true or is it not true that, with that type of securing on the stud, the entire spring finger is free to spring and yield to a torsional force, and provides a torsional spring from the point of stud mounting to the end of the wire?

A. Yes, sir, that is true. [3632]

Q. And I am there talking about the plaintiff's structure of the Weatherford scratcher as illustrated by Exhibit EJ.

A. I might add to that also, Mr. Lyon, that in defendants' structure, as shown in Defendants' Exhibit EJ, the wire——

* * *

A. (Continuing): ——the wire finger is yieldably mounted by providing the loop under the inside mounting, the extent of the wire extending from the mounting through the hole and then outwardly to its end, and interposed between that length there is a spiral spring which, in the operation of permitting the abrading finger to flex longitudinally, as the patent calls it, up or down longitudinally with relation to the well bore, acts as a torsion spring as well as also does the length of the wire spring which projects outwardly from the periphery of the collar,

(Testimony of William A. Doble.)

as well as the distance from the holding stud or rivet inside to the entrance end of the spiral coil, in other words, the entire structure acts as a torsion spring. [3633]

* * *

The Witness: EJ, your Honor.

So that we find in this structure an abrading finger which is made of spring steel which is yieldably mounted or flexibly mounted to the sleeve portion of the scratcher and enables the wires or abrading fingers to flex or to move longitudinally with relation to the well bore without distorting or deforming the respective fingers of the scratcher.

Q. (By Mr. L. E. Lyon): Now, Mr. Doble, do these scratchers have the fingers, these spring fingers yieldably secured to the collar to permit the fingers to swing longitudinally of the collar?

A. Yes, that was just the point I was endeavoring to explain, that longitudinal movement which is permitted by the torsion spring arrangement after mounting to the sleeve or collar, so that those fingers are not deformed or bent, permanently bent, during the reversal of the reciprocation of the casing which carries these scratchers in the well.

Q. Do these scratchers all operate, where they permit or take advantage of the torsion of the fingers to yieldably [3634] hold the ends of the scratcher wires in engagement with the wall bore?

The Witness: May I have that question read, please?

(Question read by the reporter.)

(Testimony of William A. Doble.)

A. Yes, sir, that is correct. That is——

Q. And do all these scratchers—and I mean all of them—by “all of them” the exhibits which you have in front of you, which are Exhibits IIII, EC——

A. CK.

Q. What? A. CK.

Q. CK? All right, CK. A. EJ.

Q. EJ, 72—— A. And 57.

Q. ——operate where the wall of the bore, well bore, is abraded by the ends of the wires?

A. Yes, sir.

Q. What is the function of that abrading, Mr. Doble?

A. The function of the abrading caused by the free ends of the spring fingers is to scratch the mud cake from the well bore and also scratch the well bore in the productive area so as to open the pores of the permeable area, so that the oil or gas may freely flow from that particular area of the well bore, particular zone or area of the well bore. [3635]

Q. Now, Mr. Doble, you have presented a sketch of a force diagram indicating the angular relation of these wires of the wall-cleaning guide to the collar. I believe that sketch that you offer was——

A. It is GD.

Q. Looking at the scratcher wire, which I believe you have lettered “E” in Exhibit GD, would you say it was correct or incorrect to say that that wire E, as you have shown it in Exhibit GD, was substantially radial?

(Testimony of William A. Doble.)

A. No, I would say it is not substantially radial. It has a sidewise inclination. I believe you are referring to the scratcher wire B which I have shown as the main wire of the scratcher body on Defendants' Exhibit GD.

Q. Pardon me. I took the wrong letter. Which is the scratcher wire that extends outwardly from the collar; is that B? A. Pardon me?

Q. Correct my previous question to use B. Would you say that the wire B is substantially radial?

A. No, sir; it is not in its effective operation. It has a sidewise, a material sidewise [3636] inclination.

* * *

Q. Do you have a model, Mr. Doble, which is comparable with the exhibit of Figure 4 of the Wright patent, Exhibit 38? If so, which one is it?

A. Yes, sir, I have. It is Defendants' Exhibit CK. [3638]

Q. Now, do the wires in Exhibit CK, or as they are shown in Figure 4 of the Wright patent, extend outwardly from the collar substantially radially?

A. Not for their full length after the wire leaves the periphery of the sleeve of the scratcher which the wires swing about an arc of a circle. At that portion of the scratcher wire the wire is not along a radius of the scratcher body. However, after it passes around the arc of the circle, then the wire may or may not travel along a true radius of the scratcher body.

(Testimony of William A. Doble.)

So that, in broad language, you might say it is radial, but it is only radial for a portion of its entire length. It has a sidewise inclination or angular relation with the sleeve from the point at which it leaves the sleeve until it passes around the radius of the circular portion bent in the wire abrading finger.

Q. And does that sidewise inclination of the structure, as you have described it, have an operative effect in the operation of the scratcher like Figure 4, or this exhibit which you have in your hand, Mr. Doble, which is Exhibit EJ? A. GD.

Q. GD.

A. Yes, sir; it definitely has, as I have portrayed the diagram of forces in Defendants' Exhibit GD, which illustrates clearly the body of the bend formed in the wire finger [3639] from the point it leaves the periphery of the sleeve of the scratcher until it is completely rounded, and from after it has rounded out to a point, then extends—it may extend radially outwardly to the end of the wire. And the very point at which that particular wire finger is leaving the periphery of the scratcher body it has a very definite angle of inclination which gradually decreases as you round the curve in the wire until you come to the straight portion, which, as I say, may then be on a radial line or it may not.

Q. Mr. Doble, you have made a vector or force diagram, Exhibit GD, which I believe is related to which scratcher?

(Testimony of William A. Doble.)

A. It is related to the scratcher, Defendants' Exhibit CK.

Q. Now, if you made a similar force diagram of the forces operative with respect to the Weatherford scratcher, Exhibit EJ, would that force diagram have the same general principles or different principles?

* * *

A. Yes. In mechanics we resolve most angular forces [3640] into a parallelogram of forces and, in the same manner as I have done in Defendants' Exhibit GD, a diagram of forces or a parallelogram of forces would be drawn which would indicate the amount of rotative force which would be applied to rotate the sleeve around the casing of the well when the wires are reversed during the reversal of the casing within the well bore.

* * *

A. Only as to proportion. The same mechanical principle applies to both.

Q. (By Mr. L. E. Lyon): Was that fact demonstrated in any way in the tests which you made, Mr. Doble?

A. Yes, sir; they were. It was demonstrated in the test of a scratcher similiar to Defendants' Exhibit EJ, which is a Weatherford type of scratcher, rotated in a steel—reciprocated in the steel cylinder, and during that operation I observed that the free ends of the wires caused the sleeve or body portion of the scratcher to rotate about the well casing or

(Testimony of William A. Doble.)

simulated well casing. And I will say that the Weatherford scratcher, as shown or as exemplified in [3641] Defendants' Exhibit CJ, there was a greater rotation at each point of reciprocation for this particular form of the wire mounting than there was in the type of wire mounting as exemplified in Defendants' Exhibit CK when it was demonstrated in the same manner, in the same demonstrating machine.

* * *

Q. Now, Mr. Doble, you have testified with respect to Exhibit GD that the horizontal component of force causing rotation is a function of the angular inclination of the wire, have you not?

A. Yes, sir; I have.

Q. And you have testified that in scratchers like Exhibit IIII or EC that that force is magnified 30 times due to the fact that there are 30 wires; that is correct, is it not?

A. That is correct. However, I would call this to [3642] your attention: In Exhibits IIII and EC, there is an additional sidewise angle to those particular wires. However, if we refer to Defendants' Exhibit CK—

Q. Well, in the Exhibit CK—that is one of the points I was trying to get to—instead of there being 30 wires in the 5½-inch size there are 50 wires, are there not? A. Yes, sir; that is correct.

Q. So that force is reflected on not by 30 in the 5½-inch size, but 50, is that correct?

A. That is correct; and there would be 30 in the 3½-inch size which has 30 wires.

(Testimony of William A. Doble.)

Mr. L. E. Lyon: Now, I would like to have placed before the witness Exhibit 1, that is the file wrapper of the 388,891 application. I will place before the witness Exhibit CJ, which is offered as a replica of the structure shown in Exhibit 1.

Q. Now, Mr. Doble, will you point out to the court from the application Serial No. 388,891, Exhibit 1, and the model, Exhibit CJ, just how the wires are secured in position in that model and in accordance with the disclosure of the application, Exhibit 1?

Mr. Scofield: Maybe we can save time by stipulating that.

Mr. L. E. Lyon: Well, what is your offer? I may be able to accept it. [3643]

Mr. Scofield: I offer to stipulate, your Honor, that the wires are held in the collar of Exhibit CJ by means of an inner band which grips a portion of the wire, of each wire, within the collar to fixedly hold the wire ends within the band of the outer collar.

Mr. L. E. Lyon: I will accept that stipulation and ask Mr. Doble if that is a satisfactorily complete description to him?

The Witness: We might add to that, that each of the scratcher wires is a separate unit. They are not joined together, and each is separately confined between the inner ring and the outer peripheral sleeve of the scratcher body.

The Court: By inner ring, you are referring to what Mr. Scofield designated as a band?

(Testimony of William A. Doble.)

The Witness: Yes, your Honor.

The Court: So here, in this scratcher Exhibit——

Mr. L. E. Lyon: CJ.

The Court: ——CJ the wires are independently held by the inner band?

The Witness: Inner band or sleeve.

The Court: Or sleeve, whereas in the other models you have been testifying about the two wires were held under a single stud?

The Witness: Yes, your Honor; that is [3644] correct.

* * *

Mr. L. E. Lyon: All right. If there is no stipulation, I will ask the witness to refer to Figure 1 of the application Serial 388,891 and tell me what the deformations are that are referred to in Figures 1 and 3 of the application, Exhibit 1, at 10, I believe, 10 and 2-B in Figure 3, and also shown at the points where the dotted lines pass around what appears to be a spot in Figure 1? [3646]

Mr. R. F. Lyon: Does your Honor want the drawing?

The Court: That is a copy of what?

Mr. R. F. Lyon: That is a copy of Exhibit 1.

The Witness: The deformation as shown in Figure 3 is indicated by the numeral 10 and that is for the purpose of projecting inwardly from the outer sleeve body of the scratcher, a projection about which the wire, that is, the end of the

(Testimony of William A. Doble.)

scratcher wire, is to be confined between the inner and outer rings of the scratcher body.

This application, Plaintiff's Exhibit No. 1, does not show pins extending through the outer sleeve portion of the scratcher body to confine the pins, but does show deforming the outer periphery of the scratcher body the sleeve of the scratcher body in the same manner as the little depressions are shown in Defendants' Exhibit CJ, and those depressions which appear on the outer surface of the sleeve cause projections upon the inner side about which the wires from the scratcher fingers are bent and confined between the inner and outer rings or sleeves of the scratcher body.

Q. (By Mr. L. E. Lyon): Now, from Exhibit No. 1, that is the Hall application, Serial No. 388,891—and it is important to get three 8's in that number instead of two—I will ask you to refer to page 15 and Claim 19 and tell me just what that claim defines, and you may, in that explanation, if you desire, refer to the model, Exhibit CJ, to [3647] point out just what that claim means and defines.

A. I will now read from Plaintiff's Exhibit No. 1, page 15, Claim 19:

“In a well bore scratcher, a sleeve mountable on a well string and having openings, a plurality of scratching elements projecting outwardly from the sleeve for abrasive contact with the wall of a surrounding well bore, the scratching elements extending through said openings with their inner ends mounted on the inner surface of the sleeve and

(Testimony of William A. Doble.)

extending axially thereof and terminating in lateral projections extending circumferentially of the sleeve, and a collar in the sleeve fixing said inner ends of the scratching elements and their lateral projections between the collar and the sleeve.”

Reading Claim 19, we find, “In a well bore scratcher”—well, Defendants’ Exhibit CJ is a well bore scratcher—“a sleeve mountable on a well string”—we have the sleeve of the scratcher body and, as we have previously pointed out, it is mounted upon a well string, heretofore referred to as the casing which is to be run into the well.

The claim further defines that the sleeve shall have openings. We have the plurality of square openings, one opening positioned adjacent each side face of the scratcher body. [3648]

“* * * a plurality of scratching elements projecting outwardly from the sleeve for abrasive contact with the wall of a surrounding well bore, * * *” We find projecting from each of the openings, from a coil spring, the free end of a scratcher wire which is arranged to engage the surface of the well bore and to scratch that surface to remove the mud cake and to open up the surface, so we do have the scratcher elements extended through said openings. As I pointed out, as they extend through, there is formed in that opening a coil torsional spring.

“* * * the scratching elements extending through said openings with their inner ends mounted on the inner surface of the sleeve * * *” Well, as we can see by looking on the inner surface or in the bore of

(Testimony of William A. Doble.)

the sleeve portion of the scratcher body, we see that the inner end of the wire extends longitudinally of the scratcher body until it passes under a collar which is mounted within the bore of the scratcher body.

The scratching elements then "extending axially thereof and terminating in lateral projections extending circumferentially of the sleeve * * *" After the wire has passed under the collar, it is not observable in Defendants' Exhibit CJ, but would follow the pattern as shown in the drawings of Plaintiff's Exhibit No. 1, and referring particularly to Figure 1 of Plaintiff's Exhibit 1, there appear in this [3649] figure the casing upon which the scratcher is mounted, the scratcher body or sleeve, the square holes in the body portion, the scratching element or wire projecting from the square hole, we can see the coil springs located within the hole and we can see the inner end of the scratcher element projecting toward the center of the scratcher body, that is, in longitudinal direction, until it passes under the inner collar. From there on the path of the inner end or fastening end of a scratcher element is shown by broken lines, as it passes under or between the collar and sleeve portion of the scratcher element. And there are little, sort of round dots that appear, one closely adjacent the position of the wire as it passes under the inner collar, and another dot which represents the projection caused by the indentation of the sleeve portion of the body adjacent the other side of the collar

(Testimony of William A. Doble.)

about which the dotted line of the confined end of the scratcher element passes at right angles and then passes to adjacent the next of the scratcher wires to the right of the one which I am describing. In other words, the wire passes under the collar to adjacent the opposite edge of the collar and then turns at right angles and finally ends under or adjacent another of the projections which are pressed through the sleeve and also at the location of the next adjoining scratcher element.

Q. And are not those punch marks shown on the outside [3650] sleeve of Exhibit CJ at the eyes where the inner-secured ends of the wires, or fixed ends of the wires on the inside of the sleeve, bent at the two right angles made as shown in the drawings, Mr. Doble? A. Yes, sir; that is correct.

Q. All right. Now, proceed with this, please.

A. The next element in the claim defines "a collar in the sleeve fixing said inner ends of the scratching elements and their lateral projections between the collar and the sleeve." As I pointed out before, we have the annular collar which is mounted within the body portion of the outer sleeve of the scratcher body and confines the free ends—or confines the inner ends, the inner ends which are to be fastened, of the scratcher wires, between the collar and the sleeve.

Q. Have you finished with that answer?

A. Yes, sir.

Q. Do any of the structures exemplified by any of the exhibits that you have before you, and which

(Testimony of William A. Doble.)

are here as the structures manufactured and sold by both plaintiff and defendants, include anything—include a structure which is defined by this Claim 19? A. No, sir. They do not.

Q. Do any of the structures of either plaintiff or defendants include an inside sleeve, an outside collar, [3651] between which the inner ends of the wires are confined as in Defendants' Exhibit CJ?

A. They do not.

* * *

Q. (By Mr. L. E. Lyon): Mr. Doble, I will refer you to the file wrapper, Exhibit No. 1, page 58 thereof, which is the communication of the Patent Office to Thomas E. Scofield, dated May 8, 1945, and which states: "This Is a Final Rejection and Closes the Prosecution Before the Primary Examiner," and ask you if it is not true that the only claim that was indicated as allowable at that time was Claim 19?

A. Yes, sir. That is correct. [3652]

Q. Now, referring to the next part of the application—no response, as shown by this file, was ever made to the final rejection of that application?

Mr. Scofield: I will stipulate that.

Mr. L. E. Lyon: So that the application then became formally abandoned, is that correct?

Mr. Scofield: That is correct.

* * *

Q. (By Mr. L. E. Lyon): Now, Mr. Doble, will you take Exhibit No. 39, that is the plugging patent,

(Testimony of William A. Doble.)

and give us a thumbnail sketch of that patent and its application to this problem?

A. Yes, sir. Mr. Wright has already gone into the [3653] necessity for forming plugs in oil wells either at the bottom or forming a bridge in the upper portion of an oil well bore, and the manner in which scratchers are used to prepare the surface of a well bore in the location of the plug so that it can be cemented and the cementing provided with a good bond between the cement and the surface of the well.

The cementing operation employed, or the cementing method employed in Defendants' Exhibit 39, that is the Wright patent '352, is carried out in a very similar manner to the method carried out in his patent '372. There is a major difference, however, and that resides in the use not of the casing which is to be run into the well and then left in the well for producing the well, that is, for the purpose of conducting gas or oil from the well. In a plugging job, it is customary to mount the scratchers on a stub or a stinger, as it is called in the art, which is attached to the lower end of the drill rod. That drill rod then, with these scratchers (indicating) mounted upon it in the same manner as they are mounted on the well casing and as shown on Defendants' Exhibit CE and also in Plaintiff's Exhibit 42, that is the B & W Bulletin 104, between suitable stop means, to permit the scratcher to have some longitudinal movement and to freely rotate on the section of the pipe or stinger, is run down

(Testimony of William A. Doble.)

to form the plugging. With the scratcher so mounted on the stinger or on drill pipe, the drill pipe is then run into [3654] the well to the location at which the plugging is to be formed. When that area is reached, the drill rod, the drill pipe is reciprocated in the same manner that the casing is reciprocated in the '372 patent, so that the free ends of the wire bristles or fingers of the several scratchers mounted on the string act on the wall of the well bore to clean the mud from the wall of the well bore and prepare it for a cementing operation.

During the reciprocation and cleaning of the well bore, a fluid, which may be a drilling mud, is pumped down through the drill rod and out the end of the drill rod and passes up——

Q. By "drill rod," you mean drill stem?

A. Drill stem—and passes up through the area which is being scratched and conditioned, so as to carry away the mud cake and filter cake which had accumulated on that particular portion of the well bore.

Following the mud, there is a cement slurry, which is a fluid, pumped down through the tubing, out the end and up through the area which has been cleaned.

The drill string is reciprocated during the flowing of the liquid cement down into the well and during its passage up around the scratching elements. Near the completion of the flow of cement or during the flowing of the cement, as the cement fills up the area to be plugged, the drill stem is lifted as the

(Testimony of William A. Doble.)

cement flows in. And, in that respect, it [3655] differs from the first method patent of Wright, Plaintiff's Exhibit 37, namely, in that earlier patent the scratchers were mounted on casing and the casing was left in a particular location during the cementing, and the cement sealed the casing to the well bore.

In this case of the plugging patent, the drill stem is lifted and the scratchers are lifted clear of the cement plug, and the entire apparatus is completely removed from the well, that is, the drill string with the scratchers on it are entirely removed from the well.

The cement is allowed to set and then such other operation as is required to bring the well into production or complete the well or carry it on.

Q. Now, the claims of this patent define what, Mr. Doble, as differentiated from the claims of the Exhibit 37 patent?

A. They define, briefly, that the element upon which the scratchers are mounted, together with the scratchers, is removed from the well after the completion of the plugging operation; whereas, in Plaintiff's Exhibit 37, the first method patent to Mr. Wright, '372, the scratchers, as they are mounted on the casing, are left in the well and are sealed in the well during the cementing operation and are a permanent part of the well structure.

Q. Is there any function in this particular patent of [3656] utilizing the scratchers to open up the productive formation?

(Testimony of William A. Doble.)

A. Only insofar as cleaning the wall preparatory to a cementing operation.

Q. Well, is or is not that a function of this scratching operation, to remove the filter cake from the productive formation?

A. Yes, sir; that is correct.

Q. And to put, you might say, a condition of virgin formation for reception of the cement?

A. That is correct. [3657]

* * *

Cross-Examination

By Mr. Scofield:

Q. The cementing method in the '372 patent, Exhibit 37.

The Court: To which you referred in your testimony.

A. I do not find the word "cement" but I find sufficient teaching in the specification to clearly indicate that the invention was broader than the use of the word "cement," and the fact is the invention is divided into two classifications.

One classification is when you are running an imperforated casing into the well and that imperforated casing is to be sealed in the well bore. Now, the sealing agent may be cement, it may be asphaltum, or it may be a plastic.

So the patent is broader than just including the word "cement." It covers any fluid that can be pumped down the well, which will seal an imperforated casing to the well bore.

(Testimony of William A. Doble.)

The other phase of the invention, as defined in Plaintiff's Exhibit 37, resides in the placing of a perforated liner. In that case there is no sealing of the perforated casing. You neither cement it in nor do you seal it by cement or a plastic.

So there are two distinct classifications of oil-well completion methods set forth in the patent, and it covers, in my opinion, the use of cement, asphalt, or any other sealing agent which may be used to permanently set a casing in the well bore, as is clearly defined in the specifications of Defendants' Exhibit 37. [3699]

Q. (By Mr. Scofield): And have you read the prosecution of that patent while it was being prosecuted through the Patent Office?

A. Yes, sir; I have. [3700]

* * *

Redirect Examination

By Mr. L. E. Lyon:

Q. There seems to be some dispute about your testimony with reference to this Exhibit EL on cross-examination. [3701] The question is: Does this Exhibit EL represent at any point a condition similar to or the same as the tests that you made of the Weatherford scratcher?

A. Yes, it does.

Q. Where?

A. Somewhere between the section which rep-

(Testimony of William A. Doble.)

resents the depth 8,475 feet and where the free ends of the wire leave the sleeves of the spiral casing.

Q. Now, you would say, then, that the line which I am pointing to on the outside of Exhibit EL represents the end of the 8 13/16ths diameter, does it not? A. It does.

Q. And the line then proceeds to a point where you see a line at the bottom of the structure which represents, I believe, the point where the outside shell becomes 14 13/16ths?

A. That is correct.

Q. Now, you say it is somewhere between those two points that represents a condition similar to or the same as the tests that you made?

A. Well, it would not extend quite as far as that last line which you have mentioned because the free ends of the wires have discontinued their contact with the spiral casing some distance before they reach the last line which you referred to, which is the casing of the 14 13/16ths diameter.

Q. I am picking out one wire, Mr. Doble, which is [3702] slightly bent between its ends and which engages the outside cylinder. And if I had a tag, I would tie a tag on it.

Have you got a tag?

I am going to tag that Exhibit EL-1, or you pick out the one yourself which you would think more closely approximates the precise condition of your tests and attach the tag and mark it "EL-1."

A. Mr. Lyon, I have placed a tag bearing the identification of EL-1 on one of the wires which I

(Testimony of William A. Doble.)

would state closely resembled the condition of the wire of the Weatherford scratcher which we tested in the machine, test machine, Defendants' Exhibit NNNN-19.

* * *

ROLAND E. SMITH

called as a witness by defendants, being first sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Roland E. Smith.

Direct Examination

By Mr. L. E. Lyon:

Q. What is your occupation, Mr. Smith?

A. Export sales representative. [3703]

Q. Representing whom?

A. Abegg & Reinhold Co., Advance Oil Tool Co., B & W, Fullerton Manufacturing Co., E. W. Farwell Co., and Corona Oil Specialties.

Q. What was your occupation in 1947?

A. I was an export sales representative.

Q. In 1948? A. The same.

Q. Who did you represent at that time?

A. 1947 or 1948?

Q. Both.

A. In 1947 I represented Abegg & Reinhold Co., Globe Oil Tool Co., Atlas Co., Weatherford Spring Co.; in 1948 I represented the same companies, with

(Testimony of Roland E. Smith.)

the exception of Weatherford Spring Co., and did represent B & W at that time.

Q. What time did that change take place of your representation of Weatherford Spring Company and B & W?

A. December 31, 1947, was the end of my connection with the Weatherford Spring Company and in January of 1948 I started with the B & W.

Q. As a result of your employment or growing out of your employment by the Weatherford Spring Company did you institute a suit against Mr. Jesse E. Hall, Sr.? [3704]

* * *

Q. (By Mr. L. E. Lyon): Mr. Smith, did you represent Mr. Hall of the Weatherford Spring Company at any time in Venezuela? A. I did.

Q. I will place before you certain documents which have heretofore been placed in evidence as Defendants' Exhibits DA, DB, DC and DC-1, and will ask you if you are familiar with these documents or this transaction?

I also hand you Exhibit CY. Include that in the same question. A. I am.

Q. Are these photostatic copies of the same exhibits that were offered in your suit at Fort Worth against Mr. Hall?

A. They are. They have my own handwriting as exhibit numbers placed thereon.

Q. There were certain centralizers called for by these documents. Were these centralizers, to your knowledge, delivered at Venezuela?

(Testimony of Roland E. Smith.)

A. They were.

Q. Do you have any documents, or did you have any documents at any time which showed the exact weights of these centralizers as they were delivered in Venezuela?

A. Yes, sir.

Q. What are those documents?

A. Those are shipping weights. The shipping weights [3707] are included upon the packing list prepared by the Weatherford Spring Company in Weatherford, Texas. I have a copy.

Q. Can you produce that copy?

A. I can.

Q. Will you do so?

A. Here?

Q. Yes.

A. You mean at the present time?

Q. Yes.

A. I do not have them. I have an analysis statement. I can produce them.

Q. Let us produce your analysis and then I will ask that you produce the originals. Let us see if the analysis will suffice at the present time.

A. I have prepared an analysis of spiral centralizers and scratchers in the sizes so indicated. [3708]

* * *

Q. What is this document, Exhibit GM, for identification?

A. Exhibit GM is an analysis of weights of spiral centralizers and scratchers manufactured by Weatherford Spring Company, and compiled from the records in the years 1945 to and including 1947.

Q. From what material was this compilation made?

(Testimony of Roland E. Smith.)

A. This compilation was made from the packing lists as supplied to me by Weatherford Spring Company in Weatherford, Texas.

Q. Where?

A. For shipments to various oil companies in Venezuela, Colombia, Peru, Arabia, Denmark, Kuwait, Trinidad; in other words, for all shipments made outside of the United States.

Q. Now, were the weights which you have indicated as in the second column of Exhibit GM weights of packing lists taken from any actual written material? A. Yes, sir.

Q. What was that written material?

A. That, the column 2, starting from the left-hand side, are the weights that were taken actually from the [3709] packing lists.

Q. By whom?

A. In the preparation of the shipments under the authorization of J. E. Hall, Jr.

Q. I mean they were placed on Exhibit GM by whom and from packing lists you state; who put them on Exhibit GM? A. I did.

Q. When?

A. Approximately two weeks ago.

Q. Now, in the third column of Exhibit GM, you have a further column entitled, "Weight List Furnished by J. E. Hall, Jr., 2-1-46." What does that column refer to?

A. That was a list that was furnished by J. E. Hall, Jr., and with a letter that I was to use in compiling different calculations for submitting of quota-

(Testimony of Roland E. Smith.)

tions in answer to inquiries received from the various foreign purchasing departments.

Q. Now, the fourth column is entitled, "Bulletin Published, 2-1-47," and it has a series of figures in that column. What are those figures?

A. Those are weights published by the manual, so designated, which is an exhibit in this case—I don't have it, but under that date, 2-1-47.

Q. And what are these figures, pounds, ounces, or what? A. Pounds. [3710]

Q. Pounds what? A. Pounds per unit.

Q. Now, you were in Venezuela and you state that you received the scratchers which were sent there. Did you ever take any photographs of them?

A. I did.

Q. What happened to the photographs?

A. The photographs were an exhibit in my lawsuit, which were never returned to me.

Q. What happened to the exhibits? Did you make any effort to recover them? A. I did.

Q. What happened to them?

A. One of the attorneys connected with Mr. Hall picked up all of the exhibits after they were returned from the appellate court in New Orleans, both plaintiff's and defendants' exhibits.

Q. Did you make a demand for the return of your exhibits? A. Yes, I did.

Q. And what response did you get to that demand?

A. I was advised that the exhibits had been destroyed. [3711]

(Testimony of Roland E. Smith.)

Q. (By Mr. L. E. Lyon): Now, were you on any of the wells in Venezuela upon which the centralizers were used that were delivered in Venezuela pursuant to any of these [3712] exhibits, DA, DB——

A. I was.

Q. ——CY, and what are the other ones?

A. DB, DA, DC and CV.

Q. Were those scratchers of any peculiar or different construction than the scratchers customarily sold, if you know, Mr. Smith?

A. They were not.

Mr. Scofield: Centralizers, you mean?

Q. (By Mr. L. E. Lyon): I mean those centralizers. Were the centralizers of standard construction?

A. They were the centralizers as contained in their catalogs under that date.

Q. There were 7-inch centralizers called for by these exhibits in front of you. Do you know what the weights of those centralizers were?

A. I do.

Q. What was their weight? A. 25 pounds.

Q. There has been handed to me, Mr. Smith, a series of photostats of further documents, some of which I believe correspond to Exhibits DA and DB, but with which I believe you are personally familiar. I will ask you to take this file and tell me what it is, and if there are duplications of those already here in evidence, just state it, and we will [3713] remove the duplicates.

(Testimony of Roland E. Smith.)

Q. Just a moment, Mr. Smith, and if it can't be stipulated, who were the attorneys that represented Mr. Hall in your case at Forth Worth?

A. Thomas E. Scofield and Ben Hagman on the main suit, and on the supplemental suit there was a firm from Fort Worth, Brown [3714] somebody——

Mr. L. E. Lyon: May it be stipulated, Mr. Scofield?

* * *

Mr. L. E. Lyon: The question before the witness was to identify these documents in this file.

The Witness: I have associated the ones I can with these exhibits that are in evidence here.

Mr. L. E. Lyon: All right. We will remove those from the file where there is duplication.

Q. And I would like to have you explain what the other documents are. Those that are duplicates, take those out. A. All right, here.

Q. Now, this is a duplicate of this (indicating)?

A. Yes. This is a duplicate of this, and this is the cost price that went with all of those.

Q. All right. Just give me the duplicates and I will take them out.

Is that duplicated in here?

A. That is a duplication of this (indicating). This is the cost price, or the retail selling price of that.

Q. All right, that is not a duplicate?

A. No.

(Testimony of Roland E. Smith.)

Q. All right, I have the duplicates [3715] removed.

Now, taking the other documents, will you tell me what they are and also if they were exhibits used—if they are photostats of exhibits used in your Fort Worth case against Mr. Hall?

A. They are.

Exhibit CY is a photostatic copy of an invoice of the Weatherford Spring Company of Venezuela, C. A., to Mene Grande Oil Company, C. A., Apartado 45, San Tome Terminal, Barcelona, Venezuela, South America. [3716]

A. Do you want the exhibit number in the other suit or not?

Q. No, no. Wait a minute. There is no exhibit number on this.

A. There is none marked on that, no.

Q. Oh, yes, there is CY on the back.

A. Yes.

Q. Does this page that you have correspond with CY? It doesn't, does it? It is another transaction?

A. No; it is the same transaction only it is changed a little bit as to quantities.

Q. What do you mean, is the same transaction but it is changed a little bit as to quantities?

A. Originally this order was issued to Weatherford Spring Company in Weatherford, Texas, by the Gulf Oil Corporation on behalf of Mene Grande Oil Company out of Pittsburgh.

Q. Do you know that to be a fact yourself?

A. I do.

(Testimony of Roland E. Smith.)

Q. How? A. I wrote the order up.

Q. Okay. Proceed.

A. This order was presented by the Gulf Oil Corporation of Pittsburgh and export procedure confirming quotation was made by me and bona fide purchase order was then issued by Gulf Oil Corporation for the equipment so contained. [3717] This particular order was one of the orders that was in the dispute in my main trial, whereby Weatherford Spring Company refused or did not ship it as the order originally stated. Rather than that, they shipped it to themselves in Venezuela and then in turn shipped it to the Weatherford Spring Company of Venezuela, shipped it to the Mene Grande Oil Company and the Weatherford Spring Company of Texas billed the Weatherford Spring Company of Venezuela for like equipment on what their was determined cost plus 10 per cent. In other words, approximately \$8,083 worth of equipment turned out to be \$156,194 order when billed to the ultimate consumer.

Q. And the evidence in your Fort Worth case showed that \$156,194 was actually what the Mene Grande Oil Company paid for that order?

A. It did.

Q. And the items that are shown on this document that you have called for 3,000 7-inch standard solid scratchers?

A. That is correct.

Q. The invoice also calls for 500 7-inch spiral centralizers?

A. That is correct.

Q. The cost set forth for these 7-inch 25-pound spiral centralizers is \$1.93, is that correct?

(Testimony of Roland E. Smith.)

A. That is correct.

Q. And that is what the Weatherford Spring Company of [3718] Texas billed the Weatherford Spring Company of Venezuela for those devices, is that correct?

A. That is correct. That is correct.

Q. This document that you have referred to here is certified to be a true copy of—what is this down here? Is that your exhibit number in the Fort Worth case?

A. That is my handwriting: "Venezuela E129." That was Plaintiff's Exhibit.

Q. In that case under that designation?

A. Yes, sir.

Mr. L. E. Lyon: I will offer this additional invoice just identified by the witness in evidence as the defendants' exhibit next in order.

* * *

The Clerk: GN.

* * *

Q. (By Mr. L. E. Lyon): Now, will you proceed? I believe there are other of these transactions here that you have before you which do not correspond to those in evidence. And I hand you another invoice of the Weatherford Spring Company to the Gulf Exploration Company, care of the Gulf [3719] Oil Company and ask you if you can identify that invoice? A. I can.

Q. What is that invoice?

A. This is an invoice by the Weatherford Spring

(Testimony of Roland E. Smith.)

Company, selling to the Weatherford Spring Company of Venezuela, both in Weatherford, Texas; and the material specified it was shipped to the Gulf Exploration Company, care of the Gulf Oil Corporation, for shipment to Kuwait, Gulf's Order No. KUOCO NY/W-758. Prices contained thereon are the minimum cost prices used between Weatherford Spring Company and Weatherford Spring Company of Venezuela, C. A.

Mr. Scofield: Any commission of 10 per cent?

The Witness: Sir?

Mr. Scofield: Is there a 10 per cent commission added?

The Witness: 10 per cent. It is cost plus 10 per cent.

Q. (By Mr. L. E. Lyon): Are you familiar with the material which was sold on this invoice?

A. I am.

Q. Was this standard equipment?

A. It was.

Q. Were the scratchers and centralizers of standard weights? A. That is my understanding.

Q. Did those scratchers and centralizers as sold on this invoice correspond in weights to those set forth on [3720] Exhibit GM for identification?

A. Yes, sir.

Mr. L. E. Lyon: I will offer this document in evidence as the defendants' exhibit next in order.

* * *

The Clerk: Defendants' Exhibit GO in evidence.

* * *

(Testimony of Roland E. Smith.)

Q. (By Mr. L. E. Lyon): I hand you a further document, Mr. Smith, which is a Weatherford Spring Company invoice of October 10, 1947, and which was identified in your action as Venezuela Exhibit E105, together with a document I note on the bottom says, "Venezuelan voucher," and ask you if you can identify those two documents?

A. I can.

Q. What are they?

A. The invoice of the Weatherford Spring Company marked E105 is the invoice used to follow the transaction of the exhibit just entered and just explained.

Q. What was that last number, GO?

The Clerk: GO.

A. GO, whereby Weatherford Spring Company of Venezuela in turn invoiced the Gulf Exploration Company in Pittsburgh covering the material for an amount of \$61,224.15 for the [3721] materials so specified.

Q. And what is the voucher that you have in your hand?

A. The voucher is a photostatic copy of the check received, with the discount, cash discount taken, amounting to \$60,031.06.

Mr. L. E. Lyon: I will ask that these two documents be clipped together and be received in evidence as the Defendants' Exhibits GP-1 and GP-2.

* * *

(Testimony of Roland E. Smith.)

Q. (By Mr. L. E. Lyon): Now, Mr. Smith, the devices that were sold on the GP-1 and GP-2, were those standard structures?

A. That was the equipment manufactured at that time and so advertised in their catalogue.

Q. Were the scratchers and centralizers that were delivered in accordance with GP-1 and GP-2 of the standard weights? A. They were.

Q. Were these also transactions, as shown by GP-1 and GP-2, which you personally negotiated?

A. I did. Now, Mr. Smith, I hand you a further document, or two further documents which are together marked [3721-A] E114. I presume that is the exhibit number in your case in Fort Worth, is that correct? A. Yes, it is.

Q. Will you tell me what these documents are?

A. The Exhibit marked E114 in the lower right-hand corner is an invoice of Weatherford Spring Company to Weatherford Spring Company of Venezuela. Invoice E-224, dated 12-17-47 covering 200 5½-inch standard solid scratchers and 40 5½-inch spiral centralizers, amounting to \$184.80.

Q. Does it give the per-piece price of each of those scratchers and centralizers?

A. It does: 49 cents for the scratcher, 5½-inch standard solid scratcher, and \$1.75 for the 5½-inch spiral centralizer.

Q. Were those standard equipment?

A. They are.

Q. Did you negotiate that sale? A. I did.

Q. Were the scratchers and centralizers de-

(Testimony of Roland E. Smith.)

livered of standard weight? A. They were.

Q. How did they compare with the weights as shown by Exhibit GM for identification?

A. They compared with the weights.

Q. By "compared with," you mean the same as?

A. Same as the weights contained in the Exhibit GM. [3722]

Q. The second document that you have in your hand, what is that?

A. The second document is marked E-114, also, in the lower right-hand corner, is Weatherford Spring Company of Venezuela, C. A., invoice to the Creole Petroleum Corporation, 15 West 51 Street, New York 19, N. Y., their order K-25292, dated 11-26-47, covering the material I just enumerated on the previous invoice, but bearing the price of \$8.00 per 5½-inch scratcher and \$28.60 per 5½-inch spiral centralizer, totaling \$2,675.40, which includes export discount plus the boxing charge.

Mr. L. E. Lyon: I will ask that these two invoices identified by the witness and which are marked in their lower right-hand corners E-114 be received in evidence as Defendants' Exhibits GQ-1 and -2.

* * *

Q. (By Mr. L. E. Lyon): Now, Mr. Smith, I hand you two other invoices marked in their lower right-hand corners, E-107, both of them. Will you tell me what those are?

A. E-107 is an invoice from the Weatherford Spring Company dated October 24, 1947, their

(Testimony of Roland E. Smith.)

order 106, to the Weatherford Spring Company of Venezuela, C. A., in Weatherford, [3723] Texas.

Do you want all of the material enumerated?

Q. I would like to have whether it sets forth the particular items which were sold and the per-piece price of each of the items.

A. It sets forth 89 $\frac{5}{8}$ -inch spiral centralizers, \$2.11 each; 80 7-inch spiral centralizers at \$1.93 each; 40 13 $\frac{3}{8}$ -inch cement baskets at \$8.25; 200 9 $\frac{5}{8}$ -inch standard solid scratchers at 74 cents each; 560 7-inch standard solid scratchers at 59 cents each; and 20 55-inch tong pull-back springs at \$1.50 each; or a total of the \$1,161.60 plus 10 per cent, a total of \$1,277.76.

The other invoice, marked E-107, is from the Weatherford Spring Company of Venezuela to the Arabian American Oil Co., 200 Bush Street, San Francisco, California, their order CAD-10153-A, invoice dated 10-16-47, covering identical items as just enumerated, but for a difference in prices per item: \$42.35 on the first item; \$33.00 on the second; \$41.25 on the third; \$9.35 on the fourth; \$8.25 on item 5; and \$6.60 on item 6, or a total of \$14,300, less the export discount, plus the export boxing charge, leaving a total invoice value of \$13,942.50.

Q. Were these standard items that were sold on these invoices that you have just identified?

A. They were. [3724]

Q. Of standard weights? A. They were.

Q. Did you negotiate the sale yourself?

A. I did.

(Testimony of Roland E. Smith.)

Mr. L. E. Lyon: I will offer these two invoices just identified by the witness in evidence as Defendants Exhibits next in order. They will be——

* * *

Q. (By Mr. L. E. Lyon): I hand you a photostat on which I note in the bottom is marked 51-3F, photostat of two sides of a check. Can you identify that?

A. That is identified over here as Plaintiff's Exhibit P-119. On the front side it is a check No. 09123 Maracaibo, Venezuela, dated February 17th, 1948.

Q. To whom is the check made payable?

A. Weatherford Spring Company, Post Office 303, Weatherford, Texas.

Q. Just a moment, Mr. Smith. The invoices which you have identified with respect to this matter show that the Mene Grande Oil Company was invoiced by the Weatherford Spring Company of Venezuela. Is this check made to the [3725] Venezuelan company or to the American company?

A. It is made to the American company, Weatherford Spring Company.

Q. And does this check on its back, do you recall, have a personal endorsement of any person?

A. It does.

Q. Who? A. Jesse E. Hall, owner.

Mr. L. E. Lyon: I will offer this check, this photostat of this check, in evidence as the Defendants' Exhibits next in order, GS.

* * *

(Testimony of Roland E. Smith.)

Q. (By Mr. L. E. Lyon): I now hand you a second check, Mr. Smith, likewise made payable to Weatherford Spring Company, a photostat of it. Was that also an exhibit in your case?

A. It was Exhibit P-120.

Q. To whom is this check made payable?

A. This check is made payable to the Weatherford Spring Company, Box 303, Weatherford, Texas.

Q. What is the amount of this check?

A. This check amounts to \$130,807.20.

Q. Is this check made in payment of any of these invoiced matters which are before you? [3726]

A. It is; yes, sir.

Q. And does this check carry a personal endorsement on its back?

A. This does not indicate a personal endorsement. It is obliterated. Weatherford Spring Company of United States, and then also Weatherford Spring Company of Venezuela, C. A. [3727]

Mr. L. E. Lyon: I will offer this check in evidence as Defendants' Exhibit GT.

* * *

Q. (By Mr. L. E. Lyon): Mr. Smith, at the time that this case was going to trial, I believe, our schedule to go to trial in 1951, in the fall, did I request that you be present to act as a witness?

A. That is correct.

Q. Just prior to that time were you in Venezuela? A. I was.

(Testimony of Roland E. Smith.)

Q. Were you detained in Venezuela?

A. I was.

Q. On charges instituted by whom?

A. Mr. J. E. Hall's attorney.

Q. What were the charges?

A. A letter was filed with the Internal Revenue Department in Venezuela, along with two schedules which contained commissions that had been paid me in the United States, but in the usual course of my procedure or association with Weatherford Spring Company, and was a schedule of commissions paid from the judgment of my lawsuit amounting to approximately \$120,000 in which it was inferred that those commissions [3728] were paid by the Weatherford Spring Company to me in Venezuela and I was thereby detained.

Q. How long were you detailed in Venezuela?

A. Approximately three weeks.

Q. How did you finally get out?

A. I was caused to hire an attorney of the Gulf Oil Corporation and management of all the oil companies revealed their books to an inspector from the Internal Revenue Department to satisfy him of my statement that I had not received any money in Venezuela.

Upon completion of this audit there in both Caracas and Maracaibo and with a hearing before the Internal Revenue board, I was granted my *Salvalicentia*, which is an exit permit from the country.

(Testimony of Roland E. Smith.)

Q. At what time of the year 1951 did you get out of Venezuela?

A. According to my records it was in June, I returned to the United States, not completing the rest of my trip. [3729]

* * *

Redirect Examination

By Mr. L. E. Lyon:

Q. I place this file before you, Mr. Smith, and ask you to take just one of these. In the first place, Mr. Smith, you have handed to me a file of packing lists. Is this the file of packing lists from which you compiled Exhibit GM? A. It is.

Q. And what are those papers that are in this file?

A. This is a copy of a packing list pertaining to each order as enumerated and designated, covering the material on the specific order as mentioned, and gives the quantities, the type of box, the type of equipment, with the gross, net, and legal weights, and then the gross, net, and legal weights in kilos, along with the cubic dimensions of each box.

Q. Is such a packing list necessary under [3739] export regulations? A. Very necessary.

Q. And it is necessary under export regulations to state the precise gross and net weights of all the items shipped?

A. It must be in all instances of any type of equipment, because it permits the purchaser to con-

(Testimony of Roland E. Smith.)

tract for overseas shipment either by net, or either by gross weight or cubic content or a combination of the two.

Q. I have picked out one packing list here. I would just like to have you read the items on that packing list into the record.

Where did this packing list come from?

A. The packing list was forwarded to my office, the export office of Weatherford Spring Company, from the client after the furnishing of the order had been completed.

Q. Is this a copy of the packing list as actually supplied to the export authorities? A. It is.

Q. Will you just read this particular packing list, giving the date and all information on it, into the record?

A. The packing list states, "Shipped by: Weatherford Spring Company—Shipper's Order: E-120." It was shipped from Weatherford, Texas, and the customer's order is E-7333-P. The destination was the Mene Grande Oil Company, C. A., care [3740] of Gulf Oil Corporation, to "Notify Stone Forwarding Co., Houston, Texas."

The consignee was Mene Grande Oil Company, C. A., at Puerto La Cruz, Venezuela.

And description of the contents, package number, kind—it states:

"1 Wooden Cases 25 5½-inch Spiral Centralizers, 20 lbs. ea."—the value of 697.13, a gross weight of 697.2, a net weight of 500 pounds, a legal weight of 500 pounds; in kilos, 316.15 gross, net 226.8, the

(Testimony of Roland E. Smith.)

legal is 226.8; the cubic dimensions are 47 inches by 46 inches by 41 inches.

Q. What does that size mean? A. Sir?

Q. What do those size figures that you just read mean? A. The last figures, you mean?

Q. Yes.

A. The last figure is the cubic content of the box in which 25 spiral centralizers were contained in the shipment.

Q. That is, it gives you the three dimensions of the box, you mean? A. Yes.

Q. O. K. Proceed to the next item.

A. Do you want each item read?

Q. Yes. [3741]

Mr. Scofield: Before he does that, your Honor, I want it understood that my objection made yesterday stands against all this testimony.

The Court: Very well. Objection overruled.

A. Packages 2 to 9 are ditto.

Package 10, a wooden case of 25 7-inch spiral centralizers, 25 pounds each, the value of 804.38, a gross weight of 864.3, net weight 625, legal weight 625; kilos 391.9, gross 283.5, net 283.5, legal; cubic dimensions, 47 inches by 48 inches by 54 inches.

Q. (By Mr. L. E. Lyon): On that column you have read a gross weight of 864, I believe.

A. Yes.

Q. Pounds? A. 864.3.

Q. Is that the measured weight of the box containing these 25 centralizers? A. That is.

Q. That is the actual scale weight of that box?

(Testimony of Roland E. Smith.)

A. That is correct.

Q. Now, the weight of the centralizers that were in the box was a weight of 625 pounds?

A. Net.

Q. Is that correct?

A. That is correct. [3742]

Q. So each of those 7-inch spiral centralizers actually weighed 25 pounds, is that correct?

A. Correct. [3743]

* * *

BRUCE BARKIS

(Recalled)

Further Direct Examination

By Mr. L. E. Lyon: [3749]

* * *

Q. (By Mr. L. E. Lyon): Now, Mr. Barkis, you have on these charts, which you have identified, set forth, made numerous entries. Can you tell me, without regard to these charts, what the causes are of fluctuations in sales of scratchers and centralizers, from your experience in selling these items to the oil companies?

A. There are many such factors. I have listed them.

Mr. L. E. Lyon: All right. You have prepared a list of them.

Perhaps we can get at this faster by just offering

(Testimony of Bruce Barkis.)

the written list, which I will ask be marked in evidence at this time as Exhibit GV. [3760]

* * *

Q. Now, Mr. Barkis, you have prepared a penciled chart which you have entitled, "Typical installation illustrating overselling by Weatherford resulting in customer dissatisfaction." You have prepared this chart, have you?

A. Yes, I did. It is a sketch.

Q. Or sketch.

Mr. L. E. Lyon: I will ask that this sketch be marked as Defendants' Exhibit GW and will ask if we may have a like stipulation with respect to Exhibit GW, Mr. Scofield.

Mr. Scofield: Yes, I will so stipulate.

Mr. L. E. Lyon: That is, it may be deemed that the witness has testified in the manner illustrated by the sketch, [3761] Exhibit GW.

Mr. Scofield: That is my stipulation.

The Court: Very well.

Mr. L. E. Lyon: I will offer in evidence Defendants' Exhibit GW. I accept the stipulation.

* * *

Q. (By Mr. L. E. Lyon): Mr. Barkis, when you were at Houston during the recess, or at about that time, did you obtain, at my request, a list of the wall-cleaning guide sales from the Houston office?

A. Yes, I did.

Q. And you have tabulated that list, too, have you?

A. Yes, I have—at my instruction.

(Testimony of Bruce Barkis.)

Q. And this list that I have in my hand is the list of wall-cleaning guide sales, set forth by years, dollar value, and number of units, is that correct?

A. That is correct.

Mr. L. E. Lyon: I will offer the list in evidence as Defendants' Exhibit GX. [3762]

* * *

Mr. Scofield: I don't think it is worth while taking the time.

The Court: And you will stipulate that he will be deemed to have so testified?

Mr. Scofield: Yes; I will so stipulate.

The Court: Very well. Pursuant to the stipulation, Exhibit GX is received in evidence. [3764]

* * *

ROY BOWERSOCK

a witness previously called and sworn, recalled on behalf of defendants in rebuttal, was examined and testified as follows:

The Court: You have heretofore been sworn and testified?

The Witness: Yes, sir.

The Court: You are now recalled for rebuttal.

Direct Examination

By Mr. Scofield:

Q. Have you made further inspection of B & W sales records since you testified last?

A. I have.

(Testimony of Roy Bowersock.)

Q. For what purpose?

A. To determine the various types of scratchers, the amounts of various types of scratchers sold. The types of scratchers are wall-cleaning guides, rotating, Multiflex scratchers used on centralizers and the Nu-Coil scratchers, and also the amount of centralizers used on scratchers.

Mr. Scofield: Schedules and charts, your Honor, have [3774] been prepared by this witness and we have keyed in the exhibit numbers of these schedules and charts with the numbers of the same companies of charts that were offered previously. And I have requested the clerk to sort out the exhibits which have been made by this witness since he last testified, and will ask that those be put before him.

Q. Do you have a set of those, Mr. Bowersock, before you? A. I do.

Mr. Scofield: A copy of these have been furnished to the other side.

Q. I put before you, Mr. Bowersock, Exhibit 175-H, and describe briefly from what records that was prepared and what the exhibit is.

Mr. L. E. Lyon: Your Honor, I am willing to stipulate that this witness, if called, would testify that he obtained this information from the records of B & W, and would testify that this is a compilation of the material that he obtained from B & W.

The Court: Testify to the facts shown on the exhibits?

Mr. L. E. Lyon: That is all the facts that are

(Testimony of Roy Bowersock.)

shown on there, your Honor, that I stated that I would stipulate.

The Court: In other words, you will stipulate that he will be deemed to have testified, without repeating it here, to all the facts set forth in Exhibits 175-H and—— [3775]

Mr. L. E. Lyon: 175-H and 175-I; then these six tabulations here, your Honor.

The Court: Are they 175-H, -I, -J, -K, -L, -M and -N?

Mr. Scofield: No, sir. They are just 175-H and 175-I.

* * *

The Court: Very well. Will it be stipulated that this witness, without the necessity of repeating it, will be deemed to have testified to the facts shown on Exhibits 175-H, -I and 176-J, -K, 175-F and -G, 178-F and -G, 179-E and -F, 180-D and -E?

Mr. L. E. Lyon: Yes, your Honor.

The Court: And 181-B.

Mr. Scofield: Accept the stipulation.

* * *

Q. (By Mr. Scofield): I would like to have you take Exhibit 175-I, Mr. Bowersock, and explain to the court the significance of the meaning of the key, just that one exhibit. [3776]

* * *

A. The key simply indicates that the one type of markings or cross-hatching on these charts desig-

(Testimony of Roy Bowersock.)

nates Nu-Coil scratcher sales and the other type designates Multiflex scratcher sales.

Q. (By Mr. Scofield): Are the sales shown on this chart, that is, is this chart a reproduction of any one of the former charts, except insofar as these key cross-sectioned areas are concerned?

A. That is right. This is the same chart that was previously put in as an exhibit, but I don't remember what the exact number of it was. It showed the scratcher sales of Import Tool Company to Canadian Gulf Company, and all that was done was to mark the chart with the Multiflex scratcher sales so as to make a designation between the two.

Q. Did you receive from Mr. Knapp any information in addition to that which you took from the invoices in the preparation of these charts? [3777]

A. I received the total over-all percentages of various types of scratcher sales.

Q. Was a chart made up from that information?

A. Yes; a chart was prepared but it is being photostated now.

Q. You do not have that at the present time?

A. No, sir. [3778]

* * *

JESSE E. HALL, SR.

a plaintiff herein, called by the plaintiff as a witness on rebuttal, having been previously sworn, was examined and testified as follows:

The Court: You have heretofore been sworn, have you not, Mr. Hall?

The Witness: Yes, sir.

The Court: And testified, and you are now recalled on rebuttal. [3782]

Proceed.

Direct Examination

By Mr. Scofield:

Q. Did you hear Mr. Wright's testimony when he was on the stand? A. I did.

Q. I would like to know, Mr. Hall, when you first put abrading elements on the outside of a casing to condition an oil well for cementing?

A. In 1935. [3783]

Q. (By Mr. Scofield): Where was this work done, Mr. Hall?

A. Near Bakersfield, California, in what is known as the Weed Patch oil field.

Q. Do you know the name of the well?

A. Yes, Bristol No. 1.

Q. Who was drilling the well?

A. The Mountain View Oil Company, which I was a member of.

Q. Who had direct charge of the drilling operations? A. I did.

Q. When was this? A. 1935.

Q. How long did it take to drill the well?

(Testimony of Jesse E. Hall, Sr.)

A. Oh, we drilled on that well over a year, but I don't really recall the exact dates. They are of record in testimony.

Q. I put before you Exhibit 270, and ask you if you can identify that and state what it is?

A. Yes. That is a map of a section of Kern County. There are the Mountain View and Edison oil fields, which include the Weed Patch district.

Q. Is the well that you have referred to, this Garner-Bristol well, noted on that map in any fashion? A. Yes. [3784]

Mr. L. E. Lyon: The map is the best evidence, your Honor.

The Witness: There is the circle.

Mr. Scofield: I did not know whether you would be able to see the notation, your Honor.

The Court: Very well. He may explain it. Objection overruled.

The Witness: There is a circle A and B, marked A and B, and at the time that I started to drill the well, when I spudded in at the first location, was the time Harold Ickes, in making a conservation for drilling, set a different ruling, and we had to skid the derrick and move deeper into the lease, and that would be B.

Q. (By Mr. Scofield): Did you obtain any record of the drilling of this well from any source?

A. Yes. I obtained the records that were filed at the Bureau of Mines, Kern, in Bakersfield.

Mr. L. E. Lyon: Your Honor, if a part of this record is going to be used, which Mr. Scofield has

(Testimony of Jesse E. Hall, Sr.)

just handed to me, we demand and request the entire record of the Division of Oil and Gas be produced and offered in evidence, and not a part and parcel of that record.

The Court: What is the exhibit?

Mr. Scofield: Exhibit No. 271, your Honor.

Q. I put that before the witness and ask him to identify [3785] it.

A. This is a witten record and a proposal to the Division of Oil and Gas, dated August 26, 1935.

Q. Who obtained that record? A. I did.

Q. From whom?

A. From the Division of Oil and Gas, in Bakersfield.

Q. When?

A. Well, I recall something like two or three years ago.

Q. Is that all that you obtained from the Division of Oil and Gas at that time?

A. This is all I obtained and all they had.

Q. What type of tool did you use on this well, the Garner-Bristol, in 1935, Mr. Hall?

A. On the 10-inch casing, I used the regular centralizer, straight centralizer, and I had taken and cut out the inside of the collars and bored holes in them and taken cable and cut it up and made bristles and put them in those holes, and, as I recall, there were two of those centralizers and scratchers, combined scratchers and centralizers, run on the surface casing.

Q. What do you mean by "the surface casing"?

A. That is the first string of casing set, to con-

(Testimony of Jesse E. Hall, Sr.)

trol head surface water and one thing and another, like cave-ins. That is required by the water district, by the Bureau of Mines, [3786] to set.

Then I ran a string of $5\frac{3}{4}$ pipe down somewhere near 5,000 feet, possibly 5,100, with six scratchers on them, manufactured by a machine shop in Bakersfield known as Chris Nelson. Those scratchers were made somewhere in the period of time in July, in June or July, 1935. They were brought out on the well.

We had a fishing job. We were ready to set the $5\frac{3}{4}$ pipe to bottom, and on the last trip in we stuck a core barrel, twisted the pipe off, and we had the pipe for a month or more, for a long period of time, laid on the lease, out on the rack, and I had all the paraphernalia ready to run on that, and these scratchers remained there on the lease, piled out near the casing, and for some period of two months or more.

Q. Who made the scratchers that were put on the water string?

A. Chris Nelson, a man running a machine shop in Bakersfield.

Q. And who made the scratchers that were put on the oil string?

A. No. You are getting the "oil string" and the "water string"—the surface string. I made the ones that went on the surface string, together with a welding shop that was on the near corner there, Western Welding Shop. [3787]

The water string, that is, the long string, the $5\frac{3}{4}$ was manufactured by Chris Nelson.

(Testimony of Jesse E. Hall, Sr.)

And then we did not get that pipe to bottom, and my proposal here is to set it off of bottom on account of we had some small drill pipe that was stuck in the hole, after fishing for quite a while, and then we set that $5\frac{3}{4}$ pipe around 5,000 feet and cemented it, and then we went in and proposed here to run a string of 4-inch onto bottom, which we would call the combination string, and that combination string had a Baker basket, a Baker casing shoe, a cast iron baffle plate, manufactured by Baker Oil Tool, and I had two small centralizers together with scratchers and bristles on them. The collars of those were developed at Hall Machine Shop at an earlier date. They were run in the hole and cemented likewise.

And that I believe was the sequence of the running of the scratchers.

And at an earlier date, either before '35 or in the first part of the year '35, before I had any of the hole ready, I got the idea of building a scratcher and I went to the Hall Machine Shop through one of their representatives which carried me there, to see if they would do some experimenting work for me, and they took on the job and there were quite a few attempts to make a scratcher. We finally wound up with two scratchers and quite a few collars left over, [3788] and they were all of the same size of this pipe that was set in Bristol No. 1. That pipe was finally set, and the size of it was $3\frac{1}{2}$ O.D. instead of $4\frac{1}{2}$, 4-inch pipe, as the chart calls for there.

(Testimony of Jesse E. Hall, Sr.)

Mr. Scofield: I should like at this time to have the permission to open the deposition of Mr. Chris Nelson that has been filed in court.

The Court: Has it been marked as an exhibit?

Mr. Scofield: Yes, sir, it has been marked as an exhibit.

The Court: What exhibit?

Mr. Scofield: 272. [3789]

* * *

Q. I put before you two photographs which have been marked for identification as Exhibits 272-B and 272-C. Can you identify those? A. I can.

Q. What are they?

A. One of them is of a scratcher, a photograph of the type of scratcher that Chris Nelson manufactured and was run on the 5 $\frac{3}{4}$ pipe, and that is Exhibit 272-B.

Exhibit 272-C is an inside photograph showing how the bristles are fastened on the inside of the collar.

Q. You also have before you a physical exhibit, Exhibit 272-A. State what that is.

A. Exhibit 272-A is the physical specimen of Exhibit 272-B.

Q. Do you know who made that?

A. Chris Nelson.

Q. At whose request?

A. At my son George's, who is deceased now.

Q. When was it made?

A. I haven't the slightest recollection as to when

(Testimony of Jesse E. Hall, Sr.)

it [3791] was made, only it was several years ago, and it was made prior to the taking of the Chris Nelson deposition.

Q. The Chris Nelson deposition was taken June 14, 1951. Was this Exhibit 272-A made before or subsequent to the taking of that deposition?

A. It was present at the taking of the deposition, so it was made prior.

Q. Now, what is this Exhibit 272-A, that is, what relationship does it bear to your Garner-Bristol well, if any?

A. It is the type of scratcher that I had Chris Nelson to make, to remove the wall cake off the bore of the well.

Q. How many of those were made?

A. Six.

Q. Did you run them in the well?

A. I did.

Q. When?

A. It was in the summer of 1935, when the string of casing was run. They were run in the well and cemented.

Q. On what casing string were they run?

A. Upon what we call the water string.

Q. How many of them were used? A. Six.

Q. Were they left in the well?

A. They were. [3792]

Q. I put before you Exhibit 47, to which is attached an envelope marked "Exhibit 47-A." Can you identify that and tell me what it is?

A. Exhibit 47-A is an invoice—

(Testimony of Jesse E. Hall, Sr.)

Q. Is that "47" or "47-A" you are referring to?

A. 47 is an invoice from the Hall Machine and Tool Works, 2020 Union Avenue, Bakersfield, California, to Hall and Son—my son involved here would be George Hall—1861 Quincy Street in the city. It says, "2 per cent 10 days."

Q. Can you identify the item that is covered by the invoice?

A. It is in the invoice. I can. It is, "Make model of cement guide." That model is the model that was made of a scratcher and a centralizer, and I believe there were some letters, as I recall, of a lot of correspondence back and forth to Samuel H. Robinson, attorney on this. It is still now a scratcher and combined centralizer of the small size. This is the same batch of equipment that was made, that I was speaking of a while ago, that I got the collars from.

Q. When was that combination scratcher and centralizer made?

A. It was made near about this date. I rather think it must have been made before—I wouldn't think it was [3793] built before, it was built possibly after, that I don't know, but it was all about this time, May 6, 1935.

Q. Were you at that time drilling this Garner-Bristol well?

A. I was.

Q. Why did you make up a device of that character?

A. I didn't make this device up of this character

(Testimony of Jesse E. Hall, Sr.)

here to run in the well because it was too small. I was thinking of it in the form of a model to secure an application—for an application to be prepared on it for filing for a patent.

Q. How was the scratcher combined with the centralizer in that model device?

A. It was made—the scratcher bristles were made and put in the collar, in one of the collars of the centralizer, as each centralizer has two collars on it.

Q. Was the structure on the centralizer the same or something different than Exhibit 278-A which you have before you?

A. I would say the structure of fastening was very much different. This structure was demonstrated at a later date as being an easier way to do it. I wasn't satisfied with the way this structure here put them on. But, this other structure, as I recall it—it has been so long ago—the bristles were fastened in kind of a hairpin form, they [3794] were pushed through, a wire in a recess, turned on the inside, and the wire threaded in through that. I have made some of that nature and that is what strikes me at this time. I haven't seen how this was put together in several years, but I am of the opinion that it was threaded together with a wire, but there were holes bored in the collar and wickers put in them. I am not clear just at this moment how they were fastened. [3795]

Q. In one of your previous answers you referred to letters of Samuel L. Robinson. I put before you

(Testimony of Jesse E. Hall, Sr.)

two letters, one identified as Exhibit 48, to which is attached an envelope marked 48-A for identification; a second letter, dated May 8, 1935, marked Exhibit 49 for identification, to which is clipped an envelope marked Exhibit 49-A for identification. Explain, if you will, or identify, if you will, the Exhibit 48 which you have?

A. Exhibit 48 is a letter that Mr. Samuel Robinson is writing me and discussing the proposal of getting William Maxwell to show him this to get him to file an application on this cement equalizer, "together with your improvement to operate to scrape and clean the bore of a well."

Q. Who was Samuel Robinson?

A. Samuel Robinson was a lawyer which I used for several years, which is now deceased. He was a partner with Joe Burke and Mark Herron, or worked out of the office there. I don't know what partnership they had—at 756 South Broadway.

Q. Here in Los Angeles?

A. In the Chapman Building, Los Angeles, California.

Q. Was he representing you?

A. Yes, he represented me in many, many cases.

Q. What did he have to do with this model?

A. As I was fully occupied in time and had no time [3796] to run back and forth to Los Angeles, he frequently came up to see me on different things. He was to bring the model back down to show it to Mr. Maxwell.

Q. Did he have any interest at all with you in

(Testimony of Jesse E. Hall, Sr.)

this model; that is, did he take any part in the payment for the service of preparing the model or anything of that sort?

A. No. I had often told him wherever he could find a manufacturer—I was kind of doing a lot of inventing along at that time—that I would give him a percentage of any contract that I might get, a license agreement, upon anyone that might do the manufacturing. From that standpoint he was interested. I had some other pumps and what not that he had done quite a bit of work in lining up.

Q. I would like to have you identify the model. Was it the model that consisted of the centralizer and the scratcher combined together, or was it some device such as you have you have before you which is Exhibit 272-A?

A. It was a scratcher and a centralizer combined together. [3797]

* * *

Q. (By Mr. Scofield): I put before you Exhibits 49 and 49-A and ask you to identify that letter if you can.

The Court: What exhibits did you call those?

Mr. Scofield: 49 and 49-A, your Honor.

A. 49 is a letter from Mr. Samuel Robinson, May 8, 1935.

* * *

A. Where Mr. Robinson had come to Bakersfield and the Mountain View oil well, and I apparently was gone when he was there. And he says he waited as long as he could and would return at another

(Testimony of Jesse E. Hall, Sr.)

time, which would be Sunday afternoon, "and I will pick up the model at that time."

Q. What was actually done with this model at that time, do you recall?

A. No. The model, when it was made, that went to Los Angeles was first sent to be chromed. It was brought to Los [3798] Angeles and chromed, and then I carried it, myself, to the office of Samuel Robinson.

Q. Who brought it to Los Angeles?

A. I did.

Q. How soon after this correspondence passed between you and Mr. Robinson was the model brought to Los Angeles?

A. Very shortly. I don't recall the amount of days, but it was a very short period.

Q. Why did you have the model chromed?

A. Because it was a rough nature and bringing it into offices where gentlemen were working, and one thing and another, where they would be handling and looking at it, I wanted it to look as nice as possible.

Q. What do you mean by chromed? Do you mean chrome-plated?

A. Chrome-plated.

Q. What was done after the model was chromed?

A. It was taken to William Maxwell's office.

Q. What did you do with it there?

A. Mr. Robinson and I went to call on Mr. Maxwell and we discussed it.

Q. What was the discussion with regard to this model?

(Testimony of Jesse E. Hall, Sr.)

A. The discussion was of filing an application on it and what it would cost. And at that time there was a matter, William Maxwell stated that he had somebody who [3799] would like to manufacture such a thing, wanted to know what kind of proposition, and I made he, Mark Herron, Samuel Robinson, and myself in the deal. I made them a proposition, and that proposition I recall two other meetings with them that I came back after that, sent and got a lot of articles.

Q. What year was this? A. 1935.

Q. All of these meetings in 1935. Did anybody else besides these three gentlemen, Messrs. Maxwell, Herron, and Robinson, see this model?

A. Yes. There was another attorney in Mr. Maxwell's office, I recall now, as Bob Maxwell. I haven't seen him or heard of him since that date.

Q. Anybody else?

A. That is all that I know of.

Q. Did Clay Miller ever see the model?

A. Oh, Clay Miller has seen the model——

* * *

A. But Clay Miller saw the model, and while they were building it I carried him over to the Home Machine Shop to look it over. We were in quite a bind as to how to put the bristles in and he was quite a builder, himself. I carried him over to see if he had any idea how to put the bristles in. [3800]

Q. (By Mr. Scofield): Did you ever file an application for patent on this particular model?

(Testimony of Jesse E. Hall, Sr.)

A. I did not.

Q. What did you do next after this model was made and you discussed it with these gentlemen?

A. There was the prior art was got on that, and I recall some patent, the Shaw patent of 1904, Arnold patent of way back before the turn of the century on a centralizer. The Shaw was on the scratcher. And then there was a lot of work done, two patents, I believe, by a fellow by the name of Brashear (Bushara). And we decided that, generically, everything that was shown in our patent and we could claim for the elements were found either in Shaw or Bushara, either one.

Mr. L. E. Lyon: Your Honor, I will move to strike the statement of this witness with respect to the disclosure of any patent, as not the best evidence. The patents themselves are the best evidence.

The Court: It is not offered for that, as I understand it.

Mr. Scofield: No, sir.

The Court: Merely to show his reasons for doing what he did.

Mr. Scofield: Yes. [3801]

* * *

The Court: Had you finished your answer?

The Witness: No. No, sir, your Honor.

The Court: Complete it.

A. At that time Mr. Maxwell, Mr. Robinson and I discussed that the elements in Brashear and the Shaw patents, if there were anything that we got

(Testimony of Jesse E. Hall, Sr.)

a patent on, it would be some little novel feature with itself, and the patent would be so slim—Maxwell called it “the art had been perforated to the degree that there would be nothing left to afford the money to file the application.”

Q. (By Mr. Scofield): Who obtained these prior art patents for you?

A. Mr. Maxwell or Sam Robinson, one. It was done through the session, I think there was a search made. [3802]

* * *

Q. (By Mr. Scofield): You referred to two patents in your testimony, one issued to Bushara and one to Shaw.

May I have 268 and 269?

A. Two to Bushara.

Q. Two patents to Bushara. I put before you Exhibit 269 marked for identification—268 marked for identification and will ask you if you can identify in this folder of patents the patents you have referred to? I will call your attention to the fact that the index in the front of that folder gives each patent an identifying number.

Mr. L. E. Lyon: Your Honor, I object to that if there is any attempt to produce any evidence as to the disclosures of these patents other than what somebody might have told him back at some time, for the patents were not pleaded prior to the commencement of this trial as required in Section 282 and all subsections of the Patent Act of 1952.

Mr. Scofield: The patents have been properly

(Testimony of Jesse E. Hall, Sr.)

pleaded, your Honor, and it will be shown that the 30-day period—that they were pleaded within the time of the 30-day period. [3803]

* * *

Q. (By Mr. Scofield): What were you selling at this time or were you selling an abrading instrument for conditioning wells at this time?

* * *

A. I was selling the Cosco well bore cleaning spiral centralizer. [3807]

The Court: Is that exemplified here by any exhibit?

Mr. Scofield: Yes.

Q. Do you have any record of any of the sales of this Cosco centralizer, as you call it?

A. I do.

The Court: At what time?

A. In 1937 to in 1939. [3808]

* * *

Q. (By Mr. Scofield): Did you make these sales?

The Court: Is it a true and correct list of them?

The Witness: It was never disputed.

The Court: You made the sales, didn't you?

The Witness: I made the sales. So far as I know, it is absolutely correct. [3812]

* * *

Q. (By Mr. Scofield): Why are your scratchers, Mr. Hall—and by “your scratcher” I mean

(Testimony of Jesse E. Hall, Sr.)

the Weatherford scratcher—why are they mounted rotatively on the casing?

A. To give relief to the fingers as they pass, swing down by the collar so that the collar can turn and give relief and the spring finger not bend it up.

Q. You mean by “relief” to relieve the stress?

A. Relieve the stress or the distance of the length of the fingers that is caught in the angle that is turning in.

* * *

The Court: Mr. Scofield, I do not want to interrupt you, but have we not been all over that before? Did not Mr. Hall tell us once how the rotating of the scratcher on the casing as the casing was lowered or raised in the well, the rotation prevented the bending or breaking of those wires or whiskers?

Mr. Scofield: This is in rebuttal, your Honor, to the [3825] testimony of Mr. Doble.

The Court: Is there any issue as to desirability?

Mr. Scofield: Well, there is an issue why these scratcher wires, these scratchers themselves, are mounted rotatively on the test.

The Court: Mr. Hall has previously told us in his previous statement that it is desirable to have the scratcher rotate on the casing so that those whiskers or wires will keep the collar from becoming bent or fouled up as the casing is raised or lowered in the well.

Mr. Scofield: Perhaps it would be sufficient for me to ask Mr. Hall, if the reason for mounting the scratcher rotatively on the casing is to increase the

(Testimony of Jesse E. Hall, Sr.)

area over which the scratchers operate upon reciprocation?

Mr. L. E. Lyon: That is objected to, your Honor, as fully covered by this witness. It is not rebuttal, because actually we were second in telling what the effect was and not first.

The Court: I do not see that there is any issue between you on that. Mr. Doble didn't express an opinion that the scratcher would survive the operations as to the well, he did express the opinion, as I understood him, that it would scratch just as well if it were welded on the casing and the casing were rotated as it would if the scratcher were rotating on the casing. I do not understand that there is any [3826] issue between the parties as to the effect or as to the desirability, relative desirability, of a rotating scratcher, is there?

Mr. Scofield: Not that, your Honor, but they are representing here, Mr. Doble in his testimony throughout, represented that the reason for rotatively mounting the scratcher upon the pipe was to obtain a greater area scratched or a pattern upon the interior or upon the inside of the well bored.

Now what I am attempting to do by Mr. Hall, is to give testimony in this case to show that that is not the intention of the rotative mounting on the scratcher at all, that there is no purpose whatever of increasing the area scratched, but it is to relieve these wires when they double back or are reciprocated.

The Court: Mr. Scofield, all you are saying is

(Testimony of Jesse E. Hall, Sr.)

that maybe Mr. Doble's reasons, that is, his No. 1 reason, that the fingers or the wires will find more area to scratch in the rotation, that your position is that the No. 1 reason is to, in effect, preserve the effectiveness of the scratcher wires as the casing is raised or lowered in the well.

Now I take it that you would not dispute Mr. Doble's statement of another reason, namely, that by rotating as the casing is raised or lowered the scratcher will probably scratch a greater surface than it would if it were welded to [3827] the casing.

Mr. Scofield: No, sir, we don't dispute that, but we don't want Mr. Doble to get on the stand and interpret the Hall applications as he did.

The Court: Just because he states one reason is the No. 1 reason, does not mean that there might not be other reasons.

Mr. Scofield: That is true. That is perfectly true.

The Court: At the present moment I am convinced that both reasons are valid for rotating it on the casing unless you gentlemen argue me out of that view. I have that present view that both reasons mentioned are rendered desirable, that that collar rotates on the casing if it is able to do so.

Mr. Scofield: That is correct, but I think that the plaintiff, your Honor, is entitled to have evidence in the case as to the primary purpose of mounting these rotatively. [3828]

(Testimony of Jesse E. Hall, Sr.)

A. I identify 277-A, as a letter I written Mr. William Maxwell requesting——

The Court: No, you do not need to tell what the letter is about. Just give us the date of it.

* * *

The Court: That is, Exhibits 277-A, -B, and -C, comprise the letter and the enclosures, do they?

The Witness: Yes, sir, and the answer.

The Court: And Exhibit 277-C is Mr. Maxwell's answer?

The Witness: That is correct.

The Court: All right. What is the purpose? Do you offer them?

Mr. Scofield: I want to merely identify the sketch as the sketch of the model to which he testified previously, that is, this model that was chromed and was sent here to [3841] Bakersfield. I want him to identify that, or if he can or not; that is. I want to know whether that is the model that was made there in Bakersfield and sent down here in 1935.

The Court: The question, then, "is Exhibit 277-B for identification intended to be a sketch of the chromed model concerning which he has previously testified?"

Mr. Scofield: That is correct.

* * *

The Court: What is the purpose of the offer?

Mr. Scofield: To establish, your Honor, that at the time the interference was declared with Mr. Wright and in [3842] attempting to establish the

(Testimony of Jesse E. Hall, Sr.)

dates of his invention of the scratcher, he wrote to Mr. Maxwell, inquiring as to the whereabouts of the model which had been made in Bakersfield in 1935. [3843]

* * *

Mr. Scofield: I will ask that the clerk mark the can as Exhibit 283-A for identification; the cylindrical member which simulates the casing, as Exhibit 283-B for identification; and the Weatherford scratcher which is mounted on the 283-B as 283-C for identification.

* * *

Q. (By Mr. Scofield): Briefly explain to the court how this demonstrator is used, Mr. [3845] Hall?

* * *

A. I will try. The purpose is to show a simulated well with various conditions in a well bore, and when a scratcher is reciprocated in and out of it, that admits a [3846] maximum and a minimum diameter, together with obstructions which is in well bores. In other words, the varying conditions, some of the varying conditions that are found in a well bore.

The Court: Is it an attempt to simulate the most adverse conditions which might be encountered in the hole; is that it?

The Witness: That is correct.

Q. (By Mr. Scofield): Is the reciprocation performed manually?

A. Yes. I will say this: it has nothing to do with

(Testimony of Jesse E. Hall, Sr.)

circulation. Those conditions that might apply to a scratcher or any of the tools is not shown in this here. It only shows the manual function of it as it is reciprocated.

Q. Why did you make the scratcher wires so much larger than the cylinder?

* * *

A. Because the knowledge of well bores varying in different diameters, much larger than the diameter of the wells drilled, and the reason of making it smaller is because the well grows in well bores. That is well recognized. And by putting the obstructions in there so that the tool has to operate when it passes by them, and those obstructions are [3847] similar functions to obstructions that are well recognized in well bores. And the size of that, comparable to the size of the scratcher that runs into it, is similar to all of the sizes that are common in the drill diameters. [3848]

* * *

Q. (By Mr. Scofield): I would like to have you make a demonstration of the use of the Hall or the Weatherford type scratcher in this demonstration can, Mr. Hall, and after that make a demonstration of one of the Nu-Coil type scratcher and finally a demonstration of the scratcher of the wall cleaning guide, if you will? [3862]

* * *

The Witness: Starting this out, the bristles overall measure 13 inches

(Testimony of Jesse E. Hall, Sr.)

Now pushing it down (demonstrating), pushing it entirely to the bottom, to the smallest diameter that the collar will absolutely go into and the diameter gets so small that the collar won't come on through (demonstrating), and pulling it up. I pulled the handle off of that.

Pulling it up with your hand now (demonstrating), showing you how easy it will reverse.

I will have to put this nut back on to show you the rotating part of it.

Now pushing it in again with this directly over the stirrup (demonstrating), and working it up and down like this (demonstrating), that is six revolutions and here it is back around again. [3865]

What that demonstrates, where the well bore is obstructed and it pushes those bristles all down there and they all fulcrum up and down. (Demonstrating.) The rotating part is not the object of the thing, that is one of the natural phenomena that come in. The tests show how the bristles that pass by, and not have to describe an arc and reverse in a cylinder, as an ordinary brush is pushed, for illustration, when you reverse the handle you have to raise it and where a cylinder has a wall on each side you can't use an arcuate finger sticking straight out. It just won't work.

All of the other, of the sidewise bristles, including the Multiflex and every one of the sidewise bristles over there will function the same way as I have demonstrated on this.

(Testimony of Jesse E. Hall, Sr.)

Mr. L. E. Lyon: I would like to call the court's attention to the fact that the wires in this particular exhibit, 273-C, I believe, which has just been demonstrated, are some of them permanently deformed by the demonstration. That means that they have been bent beyond the point of their elastic limit. [3866]

* * *

Mr. Scofield: Can it be stipulated that the Nu-Coil scratcher, Exhibit 72, would operate in the same manner in the demonstrating can?

* * *

The Court: The question is to stipulate for the purpose of this case that the results of the test would be the same if the Nu-Coil scratcher, such as Exhibit 72, were employed.

Mr. L. E. Lyon: They would be substantially the same with deformation of the wire and rotation of the scratcher.

The Court: Without commenting on the result, would the result be substantially the same?

Mr. L. E. Lyon: Yes, substantially the [3867] same.

* * *

Q. Now will you demonstrate the Nu-Coil?

The Court: Do you have a stipulation as to the Nu-Coil? [3868]

Mr. Scofield: No, the wall cleaning guide.

The Court: Perhaps we can get a stipulation as to that.

(Testimony of Jesse E. Hall, Sr.)

Mr. L. E. Lyon: I will stipulate that if an attempt is made to run the wall cleaning guide in there that Mr. Hall will hook a wire over one of those flanges on the inside and deform the wire.

Mr. Scofield: Will you stipulate that it will stick in the can?

Mr. L. E. Lyon: I will stipulate that he will hook some wires over the internal flange on the inside and stand for the proposition that it won't be removable on his demonstration. [3869]

* * *

The Witness: I would like to give the diameter of this over-all to start with.

The Court: Of the test just completed?

The Witness: Yes.

It is 13 inches over-all of the bristles.

Q. (By Mr. Scofield): That is the over-all diameter of the scratcher, Exhibit 283-C?

A. Yes. The top of the can was 11 inches.

The smallest diameter that the scratcher reversed in was $6\frac{3}{4}$ inches.

The outside diameter of the scratcher—now these are approximately, within an eighth of an inch or that close, which is ordinarily what you use in gauging this kind of stuff—the outside diameter of the collar——

Q. That is, the collar of the scratcher, 283-B?

A. Yes—is $6\frac{1}{4}$ inches, and that is a standard diameter. [3870]

In other words, it is 13 inches down to $6\frac{3}{4}$ inches,

(Testimony of Jesse E. Hall, Sr.)

which is the flexibility, and that distance is needed in completing oil well jobs.

The Court: Now you were asked to perform the test with the wall cleaning guide, Exhibit?

Mr. Scofield: 283-D.

The Witness: (Demonstrating.)

Mr. L. E. Lyon: I notice the wall cleaning guide won't go on the cylinder without being forced on.

The Witness: Well, the cylinder is just a piece of tin and all it does is simulate the well pipe.

I can leave the cylinder out and push it in with my hand.

The Court: Do you not think some of these younger men can do that?

The Witness: Anyone who wants to push it in, they can have the privilege.

* * *

The Witness: It is placed in this way and I can push it in (demonstrating). The only trouble there, it turned over sideways, but there is no way of pulling it out without cutting the bristles or taking a pair of pliers and bending them because they are radial and stick up. [3871]

* * *

Mr. L. E. Lyon: It can't be reversed, your Honor, or pulled out? I just pulled it out.

The Witness: Now I will push it back in because it was sideways.

Now it is only pushed a short ways and you may pull it out now.

(Testimony of Jesse E. Hall, Sr.)

The Court: You are going to challenge Mr. Lyon, now?

The Witness: Yes, if he can pull it out straight. There is only one way to pull it out and that is to turn it over.

(Mr. Lyon making demonstration.)

The Witness: You can turn it sideways and pull it out, but not pull it straight up. [3872]

* * *

Cross-Examination

By Mr. L. E. Lyon:

Q. Mr. Hall, is the device, Exhibits 283-A, 283-B and 283-C a device that you sent to Mr. Scofield or delivered to Mr. Scofield in June of 1945, as shown by the letters here in evidence?

A. I don't believe so. I think this is more of a recent make of a device. It was possibly something similar.

Q. What do you mean by "recent make"?

A. Well, I have made several different types. They have been made in several different tin shops that had different stirrups on them. Some had more flanges put in and weren't rolled in.

Q. And you placed these devices that you had like Exhibit 283-A, and -B, in the hands of the salesmen of the Weatherford Spring Company, didn't you?

A. That is correct.

Q. And the salesmen of the Weatherford Spring

(Testimony of Jesse E. Hall, Sr.)

Company took those around in the field to demonstrate to the customers of B and W, the operation of the wall cleaning guide, did they not?

A. Well, they demonstrate to the customers, whoever [3873] they might be.

Q. You started that demonstration, according to the testimony here, first with an attempted demonstration to Mr. Jones, while he was still at the Union Oil Company, did you not?

A. I believe my son demonstrated to Mr. Jones of the Union Oil Company.

Q. And that was in 1941, was it not?

A. I don't recall the exact date, but it was an early date.

Q. It was before the Weatherford Spring Company was manufacturing scratchers at Weatherford, Texas, wasn't it?

A. I couldn't say.

Q. You have no idea?

A. I would rather think it was after.

Q. How much after?

A. I don't know, Mr. Lyon. I don't recall of having other than one dummy test tool before they started manufacturing because I used one in my laboratory.

Q. Now how many more customers of B and W have you called on in the last year referring to the matter of this litigation than the Pure Oil Company, Bethlehem Supply Company, The Texas Company, and the Gulf Oil Company, to which reference you made in your testimony this morning on direct examination? [3874]

(Testimony of Jesse E. Hall, Sr.)

A. I called on two companies in Shreveport, Louisiana.

Q. Who are they?

A. One of them is A. J. Trayhan.

Q. Who else? A. Louisiana Natural Gas.

Q. Who else? A. I think that is all.

Q. Did you in calling upon any of these customers——

A. The Woodston Oil Company of Fort Worth is another.

Q. In calling on any of these names which were known to you to be customers of B and W and discussing the elements of this case with them, did you supply such customers with a copy of the injunction of January 25, 1952, before you entered into a conversation or at any time during that conversation?

A. Yes, I supplied them all with them.

Q. At the time of that conversation?

A. No.

Q. Did you discuss and disclose fully to them at the time of these conversations which you have had and which have been in the last six or eight months as required by that injunction present all of the issues of this case and what was completely involved in it as required by the injunction of January 25, 1952?

A. At the first call I did not discuss matters of [3875] this case. I only asked them if they were obstructed in buying B and W equipment. I was very positive and told them that I did not care to

(Testimony of Jesse E. Hall, Sr.)

discuss the case, all I wanted to know was if they were obstructed and how they were obstructed, and the reason of that I would like to explain, simply because you testified and I heard your statement, say that the supply stores which you lost, when you lost a supply store it was a total loss to B and W, and you had no way of recovering who the business was from, and I happened to know that the Bethlehem Supply Company was selling the Pure Oil Company, and that is why I started out on that mission.

Q. Now you had sent out by Mr. Ekey and two or three salesmen of the Weatherford Spring Oil Tool Company, wires to all of the salesmen to contact the customers of B and W and one such set I have had identified in evidence and demanded the rest of the correspondence.

May I have that, Mr. Scofield?

Mr. Scofield: If I have it here, you can have it.

Mr. L. E. Lyon: May I have Exhibits EJ-1 and EJ-2?

(The exhibits referred to were passed to counsel.)

The Court: Did you say EJ-1?

Mr. L. E. Lyon: FJ-1 and FJ-2, your Honor. I read it wrong.

(The exhibits referred to were passed to counsel.)

Mr. L. E. Lyon: In that regard, your Honor, I will [3876] offer in evidence at this time Exhibits FJ-1 and FJ-2 and ask if it can be stipulated—

(Testimony of Jesse E. Hall, Sr.)

Mr. Scofield: I carried those back and forth for a number of days. I don't seem to have them at the present.

The Court: You are speaking of Exhibits FJ-1 and FJ-2?

Mr. L. E. Lyon: Yes, your Honor. I am asking for a stipulation with respect to those, if those are genuine and state the facts correctly as they know them, and if it is a copy of a portion of the correspondence which I have demanded from them and which they now say they are not able to [3877] produce.

Mr. Scofield: FJ-1 is a copy of a letter that was sent to B & W by Shell Oil Company, and to it is attached FJ-2, which is a copy that was sent to Weatherford Oil Company.

The Court: Received in evidence, FJ-1 and FJ-2 for identification.

(The documents referred to, and marked Defendants' Exhibits FJ-1 and -2, were received in evidence.)

Q. (By Mr. L. E. Lyon): Who is Mr. John W. Hickey?

A. Mr. Hickey is the engineer for the Weatherford Oil Tool.

Q. Was Mr. Hickey, to your knowledge, going out through the trade and making inquiries like that referred to in Exhibit FJ-2, on all of the customers of B & W, at the time of that letter, FJ-2?

(Testimony of Jesse E. Hall, Sr.)

A. I don't know what Mr. Hickey's calls were, because I don't believe he did.

Q. Do you know how many companies he called on?
A. No, I do not. [3878]

* * *

Q. (By Mr. L. E. Lyon): Mr. Hall, you have testified concerning a well in the Mountain View oil field, Kern County, Garner Bristol #1, that you drilled or what you state that you had some capacity with reference to; and you have produced Exhibit 271, and I believe it is your testimony that [3881] Exhibit 271 constituted all of the file of the Division of Oil and Gas at Bakersfield, California, on that well; is that correct?

A. I asked them for all of the file and I went there and they said they would photostat it. We looked with a woman and we found what we wanted, the pipe that was run. I don't know whether there is any more file or not.

Q. You testified on direct examination that this was the only paper that was found; isn't that correct? Are you changing that testimony now?

A. Well, I didn't go through all of the files that they had there. I told them what I wanted. I wanted to find out the size of the pipe and when it was run in the hole.

Q. That file was open to you for your personal inspection as the person who was entitled to receive and inspect that file, was it not?

A. I remember that paper was brought to me, up to the——

(Testimony of Jesse E. Hall, Sr.)

Q. Just answer the question, please.

A. I suppose if I had asked for the file, I could have got the file. I don't know.

Q. And how did you identify this particular page in the file without getting the file, Mr. Hall?

A. I discussed with the man in charge there. I told him I wanted to find out the pipe and when it was run and the pipe sizes when the well was completed, and I wanted it [3882] photostated and he said he would have it done for me. And I went back there about two hours later or three and it was given to me.

Q. As a matter of fact you know that there was a large file, a number of papers on this well at the Bakersfield office of the Division of Oil and Gas, don't you?

A. Oh, I know there was files of when they spudded in and different things like that I don't recall, but not concerning the pipe running.

Q. And while that well was being tested in accordance with the Division of Oil and Gas, there are periodic tests made of the progress of the well and those tests are in writing and a copy of the test reports were sent to you, weren't they?

A. They were sent to the secretary of the company. I don't believe they were sent to me.

Q. And they were sent in the same way that this particular report was sent, addressed to "J. E. Hall," and that is you, isn't it?

A. That is correct.

(Testimony of Jesse E. Hall, Sr.)

Q. And in fact that was your home address, was it not?

A. That is correct. My son's address, rather.

Q. And you were staying there, too, weren't you?

A. Well, I was living in the rear at that time, part of the time. [3883]

Q. Now, this particular paper that I have presented to you, you know is data that is gathered in the form of a proposal; isn't that correct?

A. That is right, proposal.

Q. And that proposal is what you told the agent of the Division of Oil and Gas, what the condition of the well was and what you proposed to do from there on, isn't it?

A. I don't believe so. I think what this proposal is, is a copy of the well, the pipe conditions up to the date of the proposal, then plus what the proposal is from then on. That is my understanding of it.

Q. This states at the bottom of Exhibit 271: "The proposal is approved, provided that," doesn't it; and those are the three words right here after "decision," aren't they? A. That is correct.

Q. And that proposal is what you had told, you, personally, had told the agent of the Division of Oil and Gas that you intended to do, wasn't it?

A. That is correct. [3884]

* * *

Q. (By Mr. L. E. Lyon): In this proposal, in this statement of condition of well, you had reported to the Division of Oil and Gas that there was a 10-

(Testimony of Jesse E. Hall, Sr.)

inch casing that extended 840 feet into the well; that is true, isn't it?

A. That is my best knowledge now. I don't remember the 10-inch casing.

Q. And that is what you reported and the record shows that you reported to the Division of Oil and Gas; isn't that correct?

A. That is the record.

Q. And the Division of Oil and Gas could have gotten that 10-inch size from nowhere else other than from you, could it?

A. Well, they come out on the rig and get the report. They could have got it from the driller that run the pipe, or they could have taken it from the log. They generally take that stuff from the log of the driller's log.

Q. And the size of casing referred to as 10-inch casing really means 10 $\frac{3}{4}$ -inch casing, does it not; that is oil field practice? [3885]

A. I don't know in this case. I recall buying this casing, second-hand casing, and there is a 10-inch size. I wouldn't quibble over whether it was 10 or 10 $\frac{3}{4}$.

Q. As a matter of fact it was used, as you reported that fact, you having purchased the casing, to the Division of Oil and Gas, wasn't it?

A. That is right.

Q. On Exhibit 271 it says: "We propose to cement 5 $\frac{3}{4}$ -inch casing at 5100 feet to protect the hole." And I am reading from your stated proposals on Exhibit 271. Now, did you ever cement the 5 $\frac{3}{4}$ -inch casing at 5100 feet?

(Testimony of Jesse E. Hall, Sr.)

A. I don't know whether it was 5100 or 5000. It was in about that.

Q. Did you ever cement the 5¾-inch casing at all? A. Yes, sir.

Q. The decision of that proposal is that there would be—that is stated in item No. 3 under the “decision”—“the 5¾-inch casing is cemented in a bore of shale suitable for obtaining a water shut-off,” and requiring in item B a test of that water shut-off. Do you know whether any such test was ever made?

A. It would have to be made, according to the Mining Bureau, or you could not proceed with the well. I don't recall.

Q. That is the Mining Bureau regulation, is it not? [3886]

A. That is the Mining Bureau regulation.

Q. And the records of the Mining Bureau, the Division of Oil and Gas, would show whether that test was made, would they not?

A. They should show, or they could send a representative out and witness a well through an operation and permit you to do something else. I don't know. I don't recall that.

Q. According to your testimony, was the cementing job made and was the water shut-off test made?

A. I don't recall.

Q. You do not recall actually whether there was ever any cement run in this well at all or not, do you? A. I certainly do.

Q. Let us get back to this 5¾-inch. You testified under direct examination that the 5¾-inch was

(Testimony of Jesse E. Hall, Sr.)

cemented in the well. Now you say you don't recall. Which is correct?

A. I haven't said I don't recall whether it was cemented. It was cemented.

Q. Do you recall whether there was any test made for a shut-off?

A. Well, a matter of that significance, at this time, and I would only have to go to the record to say that you could not proceed unless it satisfied the Mining Bureau. I would say, yes, there was a test made. [3887]

Q. Do you have any recollection of whether a test was made? A. No, I do not.

Q. Did you proceed with the well after the test was made, if it was made?

A. We proceeded with the well.

Q. What did you do in that well after the 5¾-inch casing was cemented?

A. The drilling operations was resumed and the well was carried on down to the oil zone and another string of pipe was set with a liner on it, and put on production and produced.

Q. Before that drilling could be carried on as you have stated, you have stated that a water shut-off test is required. You know that you continued the drilling, don't you?

A. Yes, the drilling was continued.

Q. And therefore what is your testimony with respect to the water shut-off?

A. Well, my testimony—

Q. Tests? A. It was made.

Q. And you recall that, don't you?

(Testimony of Jesse E. Hall, Sr.)

A. No, I do not.

Q. You know that you could not have drilled without it; [3888] isn't that correct?

A. I know that the Mining Bureau, when you are drilling, they make your wells every so often and you have to live up to the requirements or they shut you down. They are very rigid on that.

Q. Well, just answer the question: You know that you could not have drilled and put another casing in the well, as you have testified you have done, without the water shut-off tests having been made?

A. I don't believe you could. I wouldn't—

Q. Do you know whether you attempted to carry the hole to 5200 feet before you attempted, if you did, to cement the 5¾-inch casing in the well?

A. We attempted to carry it as deep as we could. We were in a fishing job and we got a special permit to set the pipe off of bottom and to set it off the bottom at a depth to protect the hole so we could go ahead and complete it. And I recall the Mining Bureau having a witness on the job.

Q. Who was the witness?

A. I don't know. I believe his name is Munser, as well as I recall.

Q. You mean the man who signed this particular exhibit 271, E. H. Musser, M-u-s-s-e-r?

A. Musser. He was our agent out in that [3889] field.

Q. Do you know who it was that dictated this particular report 271, or who the initials "P.J.H." stand for? Maybe I can help you. You knew a man

(Testimony of Jesse E. Hall, Sr.)

in the Mining Division at that time by the name of Paul J. Howard, did you not?

A. Paul J. Howard, and Mr. Musser replaced on that work. It was the Mining Bureau in Bakersfield.

Q. Do you know Mr. Paul J. Howard?

A. I know Paul J. Howard, too, very well.

Q. And the other man with the Mining Bureau up there at that time, was a man by the name of Vern E. Austin, was it not?

A. I don't know at that time. I know Vern Austin, very well, too.

Q. Who was the driller? Who were the drillers or driller who was actually operating as an operator on this Garner-Bristol #1 well, during August and September of 1935?

A. I don't recall all. There were quite a few drillers worked there. A fellow by the name of Ames, George Hall, my son, and myself drilled most all the hole and most all of the operation.

Q. Who else?

A. I don't recall any other at this time. There could have been somebody got sick and a relief driller. This operation went on for quite a while because we got in [3890] a bad fishing job.

Q. You do not recall anybody else. Wasn't there a man by the name of Fat something, Fat Arnold or something of that kind, that was the driller?

A. I don't believe so. I don't know a fellow by the name of Fat Arnold.

Q. Do you know a man by the name of Arnold at all?

(Testimony of Jesse E. Hall, Sr.)

A. Well, I have knew Arnolds before, but I don't recall one at this moment.

Q. Was he a driller on this particular well?

A. I would have to see a log or something to refresh my mind on it. It has been 20 years ago.

Q. Besides the driller who were the members of the crew that were working on this well during August and September of 1935?

A. Mr. Lyon, I could only go back and call some of the men that worked on the well. I couldn't tell you who worked on it in August of 1935. I recall some of the men that worked on the well, possibly recall them all if I could study about them.

Mr. L. E. Lyon: I will ask that this file, which has not been presented but which I will now present to the other side for inspection, which is a photostatic copy of the file of the State Division of Oil and Gas, be marked in evidence as Defendants' Exhibit next in order. [3891]

* * *

The Court: Received in evidence. Exhibit GZ, is it not, Mr. Clerk?

* * *

Q. (By Mr. L. E. Lyon): Mr. Hall, in this report—I believe you are familiar with reading such reports, are you not?

A. Oh, I am not too familiar. I haven't read a drilling complete well report for several years, but I have been working in this stuff a pretty long while.

Q. I call your attention to a report of the Divi-

(Testimony of Jesse E. Hall, Sr.)

sion of Oil and Gas of June 14, 1944, which is after the abandonment of this well, and to a notation on this report of the Division with respect to the surface casing, and that note says: "The surface casing is $8\frac{5}{8}$ inches and not $10\frac{3}{4}$." Does that refresh your recollection anywhere as to the size of the surface casing?

A. No, it does not. I definitely recall it of being 10 inches. I got out of the well at the time it was put on production to a man by the name of Frank Goldman.

Q. Now I will call your attention to one further entry on this report. [3892]

A. What date did you say that was, Mr. Lyon?

Q. That was June 14, 1944.

A. I left there in '35. [3893]

Q. In the report of the Mining Bureau of the Division of Oil and Gas, April 27, 1944, there is a statement, " $5\frac{3}{4}$ inch cement, 5955 not tested." Doesn't that establish that the record of the Mining Bureau shows that there was no testing of that alleged cementing of the $5\frac{3}{4}$ inch casing?

A. I couldn't say at that later date. I know the drilling wouldn't have been resumed if there hadn't been some type of a test made either orally or writtenly or some way or other. It had to be permitted.

Q. Mr. Hall, as a matter of fact, these reports made to the Division of Oil and Gas as shown by this Exhibit GZ on the pages which I am marking here, starting with—well, I won't mark them, but starting with—the one showing the received date

(Testimony of Jesse E. Hall, Sr.)

of the Division of Oil and Gas of December 27, 1935, and continuing thereafter for six pages, all bear your personal signature, don't they?

A. That is correct.

The Court: Are you referring to Exhibit GZ?

Mr. L. E. Lyon: Yes, your Honor.

Q. Now these scratchers or alleged devices that you asserted that you ran in this well, you state that those that were on a 5¾ inch pipe were on the casing setting at the side of the well for at least 30 days before they were run in the well, is that correct?

A. Well, there was quite a period of time. I don't [3894] know. I would have to get a lot of records to go to find out when we finished after we bought. We bought the pipe from the National Supply Company. It was hauled there. And I remember the pipe being there quite a lengthy time. As to days, I couldn't tell you.

Q. Well, you stated on direct examination it was 30 days. Now do you want to change that testimony?

A. Well, I think I said it was a period something similar to that. I tried to qualify it. I couldn't pin it down to dates because I don't remember. I just know it was there a length of time.

Q. Well, you have no better estimate than 30 days?

A. No, I don't have no better estimate, only I would rather think it was there longer than that. It could have been shorter. I would have to get the time that the pipe was hauled from the National

(Testimony of Jesse E. Hall, Sr.)

Supply. I believe that would be the best way I can find it.

Q. Didn't you testify also previously in this case that they were there 60 days at least?

A. It could have been 60 days because we were on that well, as I recall it, over a year.

Q. Well, the two estimates that you have given by testimony, one is 30 and the other 60 days before this cross-examination, is that correct?

A. I mean it not to be days, I mean it as a space of [3895] time over some length, of material length. I couldn't tell you when you pin me down to days. It is just a faint recollection and I recall it was there quite a considerable time.

Q. Now, where was this casing where these scratchers, as you have testified, located with respect to the rig floor?

A. Well, I don't recall the directions but I recall it—I recall taking a map and drawing a map of that location and where the pipe was, and as you come in the front road you come in by the mud pumps and the ditch and you passed around the engine and the pipe was then back of that, quite a bunch of pipe.

Q. Was that on the right side of the derrick floor?

A. Well, it was back to the side and extended outward from the derrick floor.

Q. Well, now, this particular length of pipe that you say the scratchers were on, were they located right next to the derrick floor?

A. They weren't on the pipe, Mr. Lyon, until

(Testimony of Jesse E. Hall, Sr.)

the pipe was run. They were piled in a pile down on the ground at the corner of the rack. They were brought out there and throwed out of a car by this fellow Nelson, and they were pushed onto the pipe there for safekeeping where they couldn't get harmed.

Q. Your testimony now is that they were not on the pipe? [3896]

A. Not on it during this 30 days or 60 days, or whatever this period of time that the stuff set there, no, they weren't on the pipe.

Q. But they were right beside the pipe?

A. They were down kind of under the pipe.

Q. What do you mean by down kind of under the pipe?

A. The pipes were on the rack and they were down on the ground, they weren't on the pipe at all.

Q. They were on the right side of the rig floor then? A. No.

Q. Down below the pipe?

A. They were back out at the pipe rack under the pipe. The rig floor wasn't even close. You might call it close. It was close to the end of the pipe.

Q. How far was it away?

A. Well, I would say the pipe is 30 feet and across the rack, 30, 35 feet, and back under; I would say 30 or 40 feet from the rig floor.

Q. Now did any of the agents of the Oil and Gas Division inspect or look at the casing that is going to be run on a well? A. What is that?

Q. Do the agents for the Division of Oil and

(Testimony of Jesse E. Hall, Sr.)

Gas look at the pipe or casing that is going to be set in a well?

A. I would say they were out there many times during [3897] the period of time the pipe was there.

Q. They were out there looking at it very carefully, is that correct?

A. No, I wouldn't say that. That is emphasis.

Q. Were the drillers acquainted with the casing that was going to be run in the well?

A. How was that?

Q. Were the drillers that were on this job acquainted with the casing that was going to be run in the well?

A. Well, they knowed about the casing.

Q. Did they see it?

A. Well, they certainly did.

Q. Did they look at it?

A. Well, they would have to look at it. It was in their way. They couldn't do anything else but.

Q. Did they look at all of the equipment that was on the well? A. They would have to.

Q. Did your son George know what equipment was going to be run on the casing, on this $5\frac{3}{4}$ inch casing? A. I would say yes.

Q. Did you know what was going to be run on it? A. What do you mean, did I know?

Q. Yes. You were going to run, you proposed to run this $5\frac{3}{4}$ inch casing. Do you know what was going to be [3898] run on it?

A. The first time—I don't recall of making any proposal to run, or what was to go on it. After it

(Testimony of Jesse E. Hall, Sr.)

lay there—I don't recall what was to be put on the casing at this time.

Q. Did all of the drillers that were employed on the well know what was to be run on the casing?

A. I wouldn't think so. If they seen it they would know you were going to run a casing shoe, or if they seen anything that you are supposed to put on, I imagine they would know when you instructed them to put it on.

Q. Did you talk to the drillers what was going to be run on the casing?

A. Well, I don't believe that there is any other drillers except this fellow Ames, my son and myself.

Q. Did you talk to all of the drillers then about what was to be run on the casing?

A. I don't recall, Mr. Lyon.

Q. Who was the actual driller who was on the job when you state the casing was run into the hole, this 5¾ inch casing, Mr. Hall?

A. I remember staying on the job practically all the way through. I think my son George was the actual driller that run the pipe.

Q. Anybody else? [3899]

A. Well, this fellow Ames, there is a question of him working over. I believe pretty well everyone in the crew pretty well stayed over on it.

Q. Everybody that was there?

A. We generally keep two crews.

Q. And your recollection is that the entire crews, the helpers, drillers and all, stayed on the

(Testimony of Jesse E. Hall, Sr.)

job when this 5¾ inch casing was being run in the hole?

A. No, I put emphasis on it. To my recollection we had plenty of help and we kept them over and I don't recall hiring any extra help. And that is as much as I can remember of what happened.

Q. Is it your custom that you followed of having everybody that was working staying over when the casing was run in the hole?

A. Sometimes, as they were needed. I don't believe they would need them all.

Q. Well, have you any recollection who was present actually at the time the 5¾ inch casing was run in the hole? [3900]

A. Except myself and my son, is all I can remember was actually present.

Q. You can't remember anybody else?

A. No, I couldn't remember, or disremember them.

Q. Now this casing with scratchers that you assert was like this exhibit—where is it, the one with the wires on it—here it is—you assert that this Exhibit 72-A is a type of scratcher that you had in this well and there were six like that, if I understand your testimony, is that correct?

A. I recall seeing something or hearing something that there were six, and my recollection, the best recollection I have, is that there were six of them.

Q. Those are the kind of scratchers which you

(Testimony of Jesse E. Hall, Sr.)

have testified are useless and won't reverse in a well and the scratcher wires break off, is that right?

A. They are not 100 per cent useless.

Q. Just answer the question.

A. I have testified that the wires will break off when reversed in a small hole.

Q. And you have written that such scratcher is useless, haven't you?

A. They are as far as the expense of running a well, why you couldn't afford to take a chance with them. I think the public has so proved it. [3901]

Q. And you wrote that fact, that they were useless, in the letter which you wrote in 1942 to Mr. English, did you not?

A. Yes, I remember writing a letter to Mr. English.

Q. And you further wrote the fact that those scratchers were useless in your article that you wrote, "Index to Well Completions," and circulated throughout the trade, which is Exhibit CT here in evidence, and I will refer you to pages 14 and 15 of that document. Isn't that true?

A. (Examining exhibit): I don't know to what extent it circulated in the trade, but I endeavored to, anything I have written I have endeavored to give it to the trade.

Q. And here on page 15 you say, "However, the first time the pipe was lifted the flanges on the scratcher that had to reverse themselves in the shale or soft formation tore loose and dug out much formation and those that reversed in hard forma-

(Testimony of Jesse E. Hall, Sr.)

tion were cracked, broken and rolled up, rendered useless." You wrote that, didn't you?

A. Well, I wrote it, probably helped write it. I have given thought to it. And that is still my belief.

Q. And the scratchers that you were then referring to in that Exhibit CT and also in the English letter were the scratchers which you state are exemplified by Exhibit 272-A, are they not?

A. Of that type. I was writing about that type of [3902] scratcher, a radial scratcher, radial bristle.

Q. Now the stiffer the wire, in your opinion, the more useless that scratcher would be, isn't that true?

A. That is correct. No, it is not true in all cases. You can get the wire so small that it wouldn't be effective at all.

Q. And the wire on this scratcher, Exhibit 272, is 15 gauge. Here is a wire gauge.

A. I don't question it. We used 15 gauge, 14 gauge. Those are the two popular gauges for the bristles.

Q. And you represented this Exhibit 272 to be a replica of what you state was made?

A. That is correct.

Q. And didn't you testify that the original scratchers were made with 13 gauge wire?

A. The original scratchers could have been made with 14 gauge wire because I used——

(Testimony of Jesse E. Hall, Sr.)

Q. Just answer the question. Didn't it say 13 gauge?

A. I don't know, Mr. Lyon. I don't recall.

Q. And 13 gauge, on a wire gauge, is a larger wire than 15 gauge?

A. I don't recall having used a 13 gauge.

Q. Answer the question.

A. 13 is the larger, 14 is next and 15 is [3903] next. When you get to 15, they are getting pretty small.

Q. And by actual figures the 13 gauge wire is .072, 14 gauge is .080 and 15 gauge is .0915 in diameter, and I am reading from a Starrett gauge. Will you accept that? A. Yes.

Q. Now, Mr. Hall, along about September, 1935, you had Mr. Maxwell file this application, serial No. 38891, which was for improvement in casing attachment and which is here in evidence as Exhibit—what is that, PD?

Well, it was PD in the case in Louisiana. I believe that is what it shows on its face here.

* * *

Mr. L. E. Lyon: Exhibit 150. [3904]

* * *

Q. (By Mr. L. E. Lyon): In the United States Patent Office, did you not?

A. That is correct.

Q. And that application is directed to your spiral centralizer, is that correct?

A. That is correct.

(Testimony of Jesse E. Hall, Sr.)

Q. And this correspondence that you state you had with Mr. Robinson and Mr. Maxwell eventually resulted in the so-called Cosco centralizer deal, did it not? A. No, sir.

Q. By that correspondence I mean these Exhibits 48, 48-A, 49, 49-A, and that series of exhibits where you testified that Mr. Maxwell stated he had someone who might be interested, isn't that true?

A. In a round-about way. I was working on——

Q. Just answer the question.

A. Well, no, it did not.

Q. You formulated that agreement with Mr. Robinson and Mr. Lacy and the other parties in the Cosco deal shortly after this application, Exhibit 150, was filed, did you not?

A. Immediately when I discovered how to fasten the centralizer on the pipe, I immediately came to Los Angeles and contacted Mr. Joe Horaska for the Coast Oil Field Engineering Company and they were interested and we made a deal with [3905] them.

Q. And Joe Horaska was and had been a client of Mr. Maxwell for some time, wasn't he?

A. I don't know. I don't believe that Horaska was Mr. Maxwell's customer. I shouldn't say that. I have no right to say it.

Q. And isn't it a fact that the device which you state that you took to Mr. Maxwell's office and which is shown by this invoice which you have produced here, Exhibit 47, which was dated May 6, 1935, was a model of the spiral centralizer?

(Testimony of Jesse E. Hall, Sr.)

A. Absolutely not.

Q. You never took any model of the spiral centralizer to Mr. Maxwell's office?

A. I never made a model of a spiral centralizer at any time. I only made a lifesize operating spiral centralizer and it was the only one. There was never a model taken there. The only thing that I ever recall of doing anything at all or taking is some tin snips and cutting out some spiral springs, spiral strips out of very thin tin, can, and putting them together in a form of a very small centralizer. And I don't believe that Mr. Maxwell ever saw that because that was done at quite a late date.

Q. Isn't it a fact, Mr. Hall, that a spiral centralizer when used in a hole acts, when going in the hole, to trowel the side of the hole?

A. Not necessarily. The spiral [3906] centralizer——

Q. Isn't it a fact——

Mr. Scofield: Let him finish his answer.

The Witness: The spiral centralizer was so built that one spring began in the spiral looking down upon it where the other one left off to contact the entire bore of the well.

Q. (By Mr. L. E. Lyon): And that action of going in a well with that spiral centralizer was to trowel the mud on the wall just the same as a plasterer trowels the plaster on the wall of this room? A. No.

Q. And that isn't what you testified before Judge Porterie?

(Testimony of Jesse E. Hall, Sr.)

A. No, that isn't true.

Here is the true situation of the spiral centralizer. We made the spiral centralizer—I mean a spiral without the underneath helical twist, and when we would run them in the hole at that time we didn't know how to pull them down to size, we would stir up too much mud, there was too much of an abrading element.

At that time—that was in the last of '36 or '37—I devised the idea of making the helical twist and going in the hole so it wouldn't stir up so much mud; it had more of an effect toward leaning to troweling than it would being scraping, and that would make the other side on the upper movement more abrasive to take it off. That gave me quite a bit of relief [3907] in running the spiral centralizers in order to not stir up too much mud. That was the second patent that was filed.

Q. Isn't it a fact that your advertisements and the advertisements of the Weatherford Spring Company and the advertisements of the Weatherford Oil Tool Company claim that the spiral scratchers trowels the mud in going into a hole?

A. That is absolutely true because the fact that it stirs up less mud, and that is a great complaint in the oil fields today, that they stir up so much mud going in the hole that it causes more or less trouble. So we devised the undertwist to get away from that particular trouble.

Q. Now isn't it a fact, Mr. Hall, that all spiral centralizers sold by the Weatherford Oil Tool Company have for many years been banded so that they

(Testimony of Jesse E. Hall, Sr.)

are at least a quarter to a half inch smaller in external diameter than the internal bit diameter of the hole?

A. I don't believe so. They are much larger.

Q. You don't think that that is specified in the advertisements?

A. The band is smaller but it says, all of our literature says, or all of the salesmen, they all know that when you cut the band off the centralizer it swells out about an inch.

Q. Isn't it specified in your advertisements that the scratchers must be mounted on a hollow casing so that they [3908] will be one-quarter and one-half inch smaller than the diameter of the hole?

A. I don't recall, it could be, but when they are mounted, that is, after they begin to run scratchers with them—the centralizer has had a different phase, a different job to do since the scratcher has become a part of the tool. We realize that the scratcher and the centralizer is together one tool. Neither one of them is not really a tool to do the job by itself, and the trade accepts them both together. [3909]

Q. Now, how far are scratchers mounted apart on the casing—about 90 feet, aren't they, or more?

A. Scratchers?

Q. Centralizers I mean.

A. Scratchers and centralizers are mounted, lots of jobs are mounted on every joint.

Q. Just answer the question.

A. Well, I am telling you how they are mounted. And a lot of jobs, speaking of centralizers

(Testimony of Jesse E. Hall, Sr.)

now, centralizers are mounted one on every joint and at every other joint. There are two ways to mount them.

Q. What does the advertising literature of your company state with regard to that? Doesn't it state they are put 90 feet apart?

A. I think it would be according to the conditions of the hole. I think that they are qualified to put one on every joint if the hole has got an inclination. I know a lot of places they put two to the joint.

Q. I place before you the Weatherford Tool Company catalogue of March, 1951, Exhibit AY, and refer you to page 5025 and ask you if that is not the advertised and recommended spacing of scratchers and centralizers of the Weatherford Oil Tool Company?

A. Yes, but that is not followed in all conditions, and that is why they advertise to send a man out on the job [3910] and first analyze the job and tell them what to put on. This is attempted to meet all conditions, but almost every job is analyzed and engineers put them on to suit the conditions of the job.

Q. Can you show me any advertisement or publication of Weatherford Oil Tool Company at any time which advocates the mounting of the scratchers and centralizers in any manner different than Exhibit AY?

A. I don't believe that the mounting of them different, other than they show the shoe joint

(Testimony of Jesse E. Hall, Sr.)

mounted different, and possibly in some of the write-ups. But since these lawsuits have been going, we have held out from the trade in magazines and catalogues all the new discoveries. The new discoveries are now carried to the trade, and have been for the last seven years, by more or less oral, because we run and operate the jobs.

Q. Let me ask you something: In the advertising procedure of the Weatherford Oil Tool Company as shown by Exhibit AY, it is advertised that at any time there is a centralizer mounted on the casing a scratcher is placed either immediately below or immediately above that centralizer, is it not?

A. That is true. That is for the reason that the centralizer is the toughest and the strongest, and holds the pipe in the center of the hole so the scratcher can have [3911] a better chance to function. If a scratcher is on the pipe by itself and no centralizers, there is very few jobs free run. It will either stick the pipe or be torn up. You have to have centralizers to center the pipe and check it. Too much weight in the pipe for that.

Q. In this well, this Garner-Bristol Well #1, isn't it a fact that you lost a section of the core barrel in the hole and after you fished for that core barrel for a period of time you found you could not get it out, so that you requested permission of the Division of Oil and Gas to try to drill by that, or to sidestep or side drill off from that obstruction in the hole?

(Testimony of Jesse E. Hall, Sr.)

A. No. I tried to state this morning that we did a fishing job the last trip in the hole. We had already cored the thing, and it is a funny thing to say "the last trip in the hole with the drill." We were coring. My son was running the core and there came a hole in the drill pipe and it washed the hole through and the pipe was stuck below it. We pulled the pipe in two and we went in with another string of pipe and it fell in two. It was a compound bunch of fishing jobs there.

Then I went down to the Mining Bureau and discussed it with them, and I recall three or four times them coming out there before they would give me a permit to go ahead and set the casing with the fish in the bottom of the hole. We [3912] had the fish cleaned out to a certain depth, and then we set the pipe down as near as we could do it so we could start drilling fresh and tear out the balance of the pipe or sidetrack it, whatever the case might be.

Q. Isn't it true that you reported to the Division of Oil and Gas that you had junk in both of those holes at a depth from 4650 to 5640 feet and that you were using a whipstock and that the sand caved so badly in the hole that you could not keep the fish out of the way?

A. I don't recall other than I recall that we tried to sidetrack this drill pipe in the hole.

Q. And it kept tipping over and getting in your way, didn't it?

A. No, we got away from it for a while and we

(Testimony of Jesse E. Hall, Sr.)

got another fish in the other hole, so we had trouble all the way up and down the hole.

Q. All right. Just explain to me what these items mean on Exhibit 271, then, where it says: "The sand caves badly and the drill pipe catches on the whipstock frequently." What does that refer to?

A. It refers to the whipstock in the hole.

Q. And that when you try to run a pipe in by it you caught the pipe on the whipstock, didn't you?

A. That was our belief.

Q. And that is what you reported to the Division of [3913] Oil and Gas?

A. And they accepted it, and they witnessed the well all the way through.

Q. Is it your testimony and belief that these purported scratchers that you had at this well were standing around the well, all of them for some particular time before they were used; isn't that right, Mr. Hall?

A. Sometime. I don't recall how much time they were there. I remember they were there some time.

Q. And it is pretty common for everybody working on a drilling rig to be pretty well acquainted with everything that is around it, isn't it?

A. They could be, should be, I will say [3914] that.

* * *

(Testimony of Jesse E. Hall, Sr.)

Cross-Examination
(Resumed)

Mr. L. E. Lyon: There has been supplied to me a file of papers which include the original of the letter of January 14, 1954, addressed to "Mr. John W. Hickey" of the letter sent them by the Shell Oil Company, the copy of which has already been placed in evidence, so I will not require that.

There is a file of telegrams received and these telegrams are addressed to Mr. Earl Smith, to Earl H. Smith, Jr., general counsel for the Weatherford Oil Tool Company. Who [3936] is that?

Mr. Scofield: He is sitting next to me.

Mr. L. E. Lyon: That is the man. Now, these refer to wires sent out and "Your telegram dated January 7, 1954." Where are the copies of that?

Mr. Smith: You have it in your hand, Mr. Lyon, the last paper in the stack, the very last.

Mr. L. E. Lyon: The very last. Is this an asserted list of the companies to whom this telegram was sent?

Mr. Smith: No. The list of Weatherford Oil Tool Company employees to whom the telegram was sent.

Mr. L. E. Lyon: I see. I will offer this telegram as just identified by Mr. Smith in evidence at this time as the defendants' exhibit next in order, it being the telegram sent out by Mr. Earl H. Smith, Jr., general counsel of the Weatherford Oil Tool Company, Inc., to a stated list of names of employees of Weatherford Oil Tool Company, seeking

(Testimony of Jesse E. Hall, Sr.)

information and asking them to make inquiries with respect to sales of B and W equipment.

* * *

Mr. L. E. Lyon: I would like to ask if with any of these instructions to any of these people they were told to deliver a copy of the injunction of this court when they made these inquiries? [3937]

Mr. Smith: The only instructions given to men were contained in the telegram, Exhibit—what is that, HA?

Mr. L. E. Lyon: I will accept that stipulation.

The Court: The document last offered is received in evidence and will be marked Defendants' Exhibit.

The Clerk: HA.

* * *

Mr. L. E. Lyon: Here is the second paper in this list, and I presume it is that these telegrams were received by you, Mr. Smith?

Mr. Smith: They were received in the office and delivered to me.

Mr. L. E. Lyon: I will offer the second document in this as the defendants' exhibit next in order, which is a letter written by H. T. Cromm to the Weatherford Oil Tool Company, attention of "Dear Mr. Bodin." Who is Mr. Bodin, B-o-d-i-n?

Mr. Smith: One of the employees who works for Weatherford Oil Tool Company.

Mr. L. E. Lyon: And which states, in part: "Jones and Laughlin, Bethlehem Supply Company and Continental Supply had stop orders and were

(Testimony of Jesse E. Hall, Sr.)

selling B and W scratchers for an approximated period of 18 months." [3938]

* * *

Mr. L. E. Lyon: It is offered for the purpose of identifying a letter at this time. And I will offer this last letter. What is the exhibit number?

The Clerk: HB.

Mr. L. E. Lyon: HB in evidence.

* * *

Mr. L. E. Lyon: Here is a letter from Mr. Al Smith, Harvey. Who is Mr. Al Smith, Harvey?

Mr. Smith: Sales representative of Weatherford Company, located at Harvey, Louisiana.

Mr. L. E. Lyon: It is a telegram addressed to you and, I presume, received by you.

Mr. Smith: Yes.

Mr. L. E. Lyon: This telegram is dated January 8, 3:23 p.m. I presume that is January 8, 1954?

Mr. Scofield: All of those were in 1954.

Mr. Smith: I presume so. They were received in the first few days of January of this year.

Mr. L. E. Lyon: I will offer this wire in evidence as Defendants' Exhibit next in order. [3939]

* * *

The Clerk: Defendants' Exhibit HC in evidence.

Mr. L. E. Lyon: Here is a wire received also, no date given, but it must have been on the 10th, I guess, of January, 1954.

Mr. Smith: I don't know what date it was re-

(Testimony of Jesse E. Hall, Sr.)

ceived, but it was received in the first two weeks of January of 1954.

Mr. L. E. Lyon: From Jack Humphreys. Who is Jack Humphreys?

Mr. Smith: He is also a salesman of Weatherford Oil Tool Company. And in that regard, all those telegrams are from a representative of Weatherford Oil Tool Company.

Mr. L. E. Lyon: Which I offer in evidence as the Defendants' Exhibit next in order.

The Clerk: Defendants' HD.

* * *

Mr. L. E. Lyon: And who is Tommie Clausen?

Mr. Smith: To the best of my understanding, he handles Weatherford merchandise.

Mr. Scofield: At Williston, North Dakota.

Mr. L. E. Lyon: He is an employee of the Weatherford Company? [3940]

Mr. Smith: No, he is not. That is why I make the distinction.

Mr. L. E. Lyon: This telegram was received by you on January 12th, 1954?

Mr. Smith: Yes, I believe it was.

Mr. L. E. Lyon: I will offer this telegram in evidence as Defendants' Exhibit next in order.

The Court: Received in evidence.

The Clerk: Defendants' Exhibit HE in evidence.

* * *

Mr. L. E. Lyon: James Bradley, is he an employee of Weatherford Oil Tool Company?

(Testimony of Jesse E. Hall, Sr.)

Mr. Smith: Yes, he is.

Mr. L. E. Lyon: Located where?

Mr. Smith: Corpus Christi.

Mr. L. E. Lyon: Corpus Christi, Texas. This wire was received by you on January 11, 1954?

Mr. Smith: Right, on the date stated on the telegram.

Mr. L. E. Lyon: This wire refers to other stop orders issued by other companies of the B & W equipment of which I was not even aware, your Honor, as the result of the January, 1952, letter, the \$2.50 royalty letter. I will offer this wire in evidence at this time as Defendants' Exhibit.

The Clerk: HF. [3941]

* * *

Mr. L. E. Lyon: Now, who is Bob Yates; is he an employee of the Weatherford Oil Tool Company?

Mr. Smith: Yes, employed at Shreveport, Louisiana, sir.

Mr. L. E. Lyon: And he covers the Shreveport area, is that correct?

Mr. Smith: Well, north Louisiana and Arkansas, and at one time a portion of east Texas.

Mr. L. E. Lyon: And this telegram was received by you on January 9, 1954, was it?

Mr. Smith: At or about that time. I assume it was on the 9th, if that is the date. [3942]

Mr. L. E. Lyon: I will offer this telegram in evidence as Defendants' Exhibit next in order.

Mr. Scofield: No objection.

(Testimony of Jesse E. Hall, Sr.)

The Court: Received in evidence.

The Clerk: Defendants' Exhibit HG in evidence.

Mr. L. E. Lyon: Who is Mr. Lee Monty?

* * *

Mr. Smith: Under his agreement with the company he has the entire State of California, and I am not familiar with his intimate operations.

Mr. L. E. Lyon: And this wire was received by you on January 9th?

Mr. Smith: If that is the date stated.

Mr. L. E. Lyon: I will offer this wire in evidence as Defendants' Exhibit next in order.

The Court: Received in evidence.

The Clerk: Defendants' Exhibit HI in evidence. [3943]

* * *

Mr. L. E. Lyon: And who is R. L. Wood?

Mr. Smith: A Weatherford sales representative at Abilene, Texas. I received that telegram January 9th.

Mr. L. E. Lyon: I will offer this telegram in evidence as the Defendants' Exhibit next in order.

The Court: Received in evidence.

The Clerk: Defendants' HJ in evidence.

* * *

Mr. L. E. Lyon: And Oscar Gay, is he an employee of the Weatherford Oil Tool Company?

The Witness: Yes, he is; located at—

Mr. L. E. Lyon: And covering what territory?

(Testimony of Jesse E. Hall, Sr.)

Mr. Smith: Frankly, I don't know. He is located at Long Beach.

Mr. L. E. Lyon: And this wire which you received, you received this wire on January 9, 1954, did you?

Mr. Smith: Yes.

Mr. L. E. Lyon: I will offer this wire in evidence as the Defendants' Exhibit next in order. All of these offers being in evidence, having been pursuant to my demand for the production of these documents, your Honor.

The Court: Received in evidence. [3944]

* * *

Q. (By Mr. L. E. Lyon): Mr. Hall, I am placing before you Exhibit HF, being a wire sent by James Bradley from Corpus Christi to Mr. Earl H. Smith, the Weatherford Oil Tool Company, on January 11, 1954, and I will ask you if you know who this wire refers to when it states: "Alice and Freer of Corpus Christi"? A. No, I don't.

Q. Is that a distributor, a supply house, or what?

A. I would rather say it is a town, Corpus Christi, Alice, and Freer. I think those are three towns.

Q. Then you read this line: "J and L"—what is "J and L," do you know. A. Yes.

Q. What is "J and L"?

A. I presume it is J and L Steel Corporation.

Q. Jones and Laughlin? A. Yes.

(Testimony of Jesse E. Hall, Sr.)

Q. And this wire then says, and according to the way you interpret it: "J and L Corpus Christi Alice and Freer Stopped Selling August or September 1952 and Resumed Selling About May of 1953." Is that the way you read it?

A. I read: J and L, the Corpus Christi store, Alice store and Freer store. Now, I don't know whether they have [3945] stores in those three places, but that is what I would read it.

Q. And it says that they stopped selling in August or September, 1952, and did not resume until May of 1953? Is that the way you read it?

A. That is the way I read it.

Q. In the next line it says: "Continental Corpus Christi McAllen"—is that another town in Texas?

A. I would read that as a town.

Q. And what is the next one; is that a town, too, Falfurrias?

A. That is a town, too, to my opinion.

Q. "Stopped Selling About July, 1952, and Has Not Resumed Selling Yet." So in that sentence you read: Corpus Christi and McAllen and Falfurrias all refer to towns in Texas, is that correct?

A. I would say so.

Q. And it says here on the end: "Alice Store Sold One Order Since Stop Order." That is, I presume, the Alice store referred to up here with reference to J and L Corpus Christi. Is that the way you read the wire?

A. I believe so.

Mr. L. E. Lyon: I will offer also this letter of January 15, 1954, which is addressed to Mr. Thomas E. Scofield, Kansas City, Missouri, and

(Testimony of Jesse E. Hall, Sr.)

written by J. Ronald Johnson, [3946] attorney for the Jones and Laughlin Steel Corporation, which letter starts off in the first sentence and says: "Mr. John Hall has asked on several occasions concerning the handling by us of B & W Nu-Coil and Multiflex scratchers." That is John A. Hall, and ask that this letter be received in evidence as the Defendants' Exhibit next in order.

Mr. Scofield: No objection.

The Court: Received in evidence.

The Clerk: Defendants' HL.

* * *

Mr. L. E. Lyon: I presume, Mr. Smith, that this is a true copy of the letter which was on that date addressed to [3947] the Stanolind Gas & Oil Company by you and Mr. Hickey jointly?

Mr. Smith: No.

Mr. L. E. Lyon: By whom? Who is Mr. E. H. Smith?

Mr. Smith: The letter is not a true copy of the letter that went to Stanolind, in these respects: the copy that went to Stanolind was a blind copy and did not indicate a copy to Mr. Scofield. Furthermore, my name, my signature was not on the letter to Stanolind. That signature is on this carbon to Mr. Scofield. The original is on the letterhead.

Mr. L. E. Lyon: And the stamp of Mr. Scofield did not appear on it, also?

Mr. Smith: That is right.

Mr. L. E. Lyon: With this letter was there any copy of the injunction of January 25, 1952, sent

(Testimony of Jesse E. Hall, Sr.)

with the original of this letter to the Stanolind Oil & Gas Company?

Mr. Smith: So far as I know there was not. Mr. Ekey sent the letter. I did not.

Q. (By Mr. L. E. Lyon): Mr. Hall, I place before you a letter addressed to Pure Oil Company, or addressed to you by the Pure Oil Company, in which the first letter refers to a conversation which you had with the Pure Oil Company, is that correct? A. That is correct.

Mr. L. E. Lyon: I will offer this letter of January 7, 1954, in evidence as the Defendants' Exhibit next in order. [3948]

The Court: Received in evidence.

The Clerk: Defendants' Exhibit HN in evidence.

* * *

Q. (By Mr. L. E. Lyon): At the time you had this conversation with Mr. E. E. Edwards, purchasing agent of the Pure Oil Company, on January 7, 1954, did you give Mr. Edwards a copy of the injunction of January 25, 1952?

A. I did not, but I asked him if he knowed about the injunction in this case and he said he did.

Q. Did you tell him anything about the condition of the case and issues of the case as required by the injunction of January 25, 1952?

A. I never told him not one condition about the case of any kind.

Q. Now I hand you a copy of a letter addressed to you of January 8, 1954, from the Atlantic Re-

(Testimony of Jesse E. Hall, Sr.)

fining Company. Did you have a conversation with that man at the Atlantic Refinery Company on or about January 8, 1954?

A. I talked to the lawyers. I presume this is one of them.

Q. When did you have that conversation with regard to the date of this letter?

A. Prior to that date of the letter possibly one day or two days. [3949]

Mr. L. E. Lyon: I will offer in evidence this letter which is addressed to Mr. J. E. Hall, Sr., Box 303, Weatherford, Texas, and signed by Mr. "J. P. Johnson" of the Atlantic Refining Company, in evidence as the Defendants' Exhibit next in order.

The Court: Received in evidence.

The Clerk: Defendants' Exhibit HO in evidence.

* * *

Q. (By Mr. L. E. Lyon): At the time you had this conversation with Mr. J. P. Johnson about January 7, 1954, did you deliver to the Atlantic Refining Company a copy of the injunction of January 25, 1952? A. I did not.

Q. Did you tell him just exactly what all of the issues and contentions of the parties were in this litigation?

A. I never discussed no issues of the parties with him.

Q. I place before you a copy of a letter addressed to you, entitled "Re scratchers and central-

(Testimony of Jesse E. Hall, Sr.)

izers" of January 15, 1954, signed by "Mr. Darrell P. Miller, vice-president," and ask you if you had a conversation with that man on or about that date?

A. I did. [3950]

Q. At the time you had that conversation did you deliver to Mr. Miller or to the National Gas and Oil Corporation a copy of the injunction of January 25, 1952?

A. He said he had a copy of it.

Q. He said at that time that he had a copy of it?

A. Yes.

Mr. L. E. Lyon: I will offer in evidence this letter of January 15, 1954, as defendants' exhibit next in order.

The Court: Received in evidence.

The Clerk: Defendants' HP in evidence.

* * *

Redirect Examination

By Mr. Scofield: [3951]

* * *

Q. (By Mr. Scofield): What, if anything, did you have to do with the sending of the \$2.50 letter, Exhibit JJJ? [3952]

* * *

The Witness: I came to Kansas City and discussed with you, with the merits that called to sending the letter out.

Q. (By Mr. Scofield): What do you mean by the "merits"?

(Testimony of Jesse E. Hall, Sr.)

A. I mean the information that caused us to arrive at the decision of sending the letter out.

Q. What was the information you gave me?

A. Well, it had been gathered together over some four or five months and I just called on Mr. Franklin, who is one of our past representatives, and they had a stock of B and W stuff hid away in a warehouse across the street, they had some calling cards or fly sheets, I would call them, the size of filing cabinets, stating the method of cementing and they had the numbers of the cement method on the back.

* * *

Q. (By Mr. Scofield): Are those cards in evidence? Are those fly sheets in evidence, Mr. Hall?

A. They are in evidence.

The Court: In this case?

The Witness: Yes, sir. [3953]

The Court: Those are the ones that are as big as what? Did you say they were as large as filing cabinets?

The Witness: They are as large as a filing cabinet, paper size.

The Court: At that time had B and W started stamping the invoices?

The Witness: Yes, sir.

The Court: You knew about that?

The Witness: I knew about that.

The Court: Was that part of the merits of sending the \$2.50 letter?

The Witness: That is part of it. When you lay

(Testimony of Jesse E. Hall, Sr.)

the invoice to the customer and the method, and the salesmen are calling upon the customer and telling them that this is what B and W has got to sell, and and that all of this is the patent number, and I found that sales—— [3954]

* * *

Q. (By Mr. Scofield): What I was asking, Mr. Hall, was what your reasons were for instructing me to send the \$2.50 letter.

* * *

A. Well, not particularly due to the fact that the method upon this paper and the stamping of the invoices and calling on the customers to tell them that was the method—that was the principal reason.

* * *

The Court: Just a moment. I would like, as long as we are on this subject, to ask, how did you happen to choose \$2.50? Was that because it was somewhere near four times 60 cents?

The Witness: No, sir. Knowing that the cost of selling this material and running it, which runs about 55 per cent, and the cost of manufacturing, I had taken the profit, a portion of the royalty that they would have and a portion of the profit.

The Court: So that the 65 cents that B and W was stamping on the invoice was too low? [3955]

The Witness: No, they were sending out, collecting their profit in the \$6. They were only just setting a 60 cent rate and telling the customer they

(Testimony of Jesse E. Hall, Sr.)

are not charging them any more. What they really were doing, they were saying, we are merely informing you that we have got this patent and this is the steps of it. It was all over. I don't believe there is an oil field that is drilling that you don't see those boxes with that all over it. And I haven't found a filing cabinet of any purchasing agent all over the country but what they have the same thing in it. And it was something that we just had to overcome because within three months we lost four of our district salesmen who went to them. They couldn't combat the idea of having the patent number on the thing, that it covers all the steps that we were using.

The Court: You felt you had to use some of the same methods?

The Witness: Something or other to call attention to them, to cause them to stop.

The Court: On the old theory of the way to fight fire is with fire? [3956]

* * *

Q. (By Mr. Scofield): Are the fly sheets that you have referred to in your previous answer the Exhibits 209 and 210 which I put before you?

A. Yes, sir.

Q. Now what were these filing cabinets you referred to, were those the boxes in which the B and W scratchers were sent?

A. No, the filing cabinets in the oil companies' offices, wherever the purchasing agent is, why they have these [3957] that have been given to the pur-

(Testimony of Jesse E. Hall, Sr.)

chasing agents all over the country and their superintendents, where they have their offices with catalogs or anything that contains this method set out here.

Q. Have you seen those in those filing cabinets?

A. Yes, sir, I have.

The Court: You really are referring to something about letterhead size?

The Witness: Yes, sir.

The Court: Standard letterhead size?

The Witness: Yes.

The Court: Eight and a half by eleven inches?

The Witness: Yes.

The Court: Is that correct?

The Witness: That is correct. [3958]

* * *

DEPOSITION OF CHRIS NELSON

having been first duly sworn, deposed and testified as follows:

Direct Examination

By Mr. Scofield:

Q. Please state your name.

A. Chris Nelson.

Q. Talk to him—— A. Yes.

Q. And talk slowly so that he can get it.

Where do you reside, Mr. Nelson?

A. Taft, California.

Q. What is your age?

A. I will be 70 October 30th.

Q. How are you occupied at the present time?

(Deposition of Chris Nelson.)

A. Well, I am unemployed.

Q. What is the state of your health?

A. Well, fair, I would say. It is not too good.

Q. Have you had any difficulty lately?

A. In health?

Q. Yes.

A. Oh, about a year ago I had a stroke, a little over a year ago.

Q. What was your occupation prior to the time that you had this stroke? [3834-2]

A. I was a machinist, doing machine work.

Q. Where did you learn your trade, Mr. Nelson?

A. In Albuquerque, New Mexico, with the Santa Fe Railroad.

Q. What year was that?

A. 1899 I started.

Q. How long were you with the Santa Fe there and learning your trade?

A. Four years apprenticeship.

Q. Did you stay with the Santa Fe after you had served your apprenticeship? A. No, sir.

Q. Where did you go from Albuquerque, and what was it, 1901 or '2 or '3?

A. 1903 I went to Chickasha, Indian Territory, Oklahoma now.

Q. That was before Oklahoma had been admitted as a state? A. Yes.

Q. Who did you work for?

A. Rock Island, Pacific Railroad—Chicago, Rock Island and Pacific.

(Deposition of Chris Nelson.)

Q. How long?

A. Oh, I think I worked there possibly nine months, something like that. [3834-3]

Q. As a machinist? A. Yes, sir.

Q. Who did you work for next, any personal friend?

A. No, I worked for the Frisco Railroad, the San Francisco, or whatever it is.

Q. Where? A. At Springfield, Missouri.

Q. What year was that?

A. That was in 1903.

Q. And still working as a machinist?

A. Yes, when I am able.

Q. In the railroad shops?

A. No, I followed oil tool work for several years past.

Q. After you had worked for the Frisco in Springfield, Missouri, in 1903, where next did you work?

A. I went back to the Santa Fe Railroad at Winslow, Arizona.

Q. In the Santa Fe shops? A. Yes, sir.

Q. Working as a machinist? A. Yes, sir.

Q. How long did you remain at Winslow?

A. I can't just remember. It was about——

Q. An approximation is good enough. [3834-4]

A. It was a very short time. It was probably six months that I worked there.

Q. What was the occasion of your moving around so much during this early period?

A. Well, I don't know, I guess it was more or

(Deposition of Chris Nelson.)

less trying to get experience, and most of the young men in those days as apprentices would be talked to to get out, into other shops and gain more knowledge of the trade and experience, mostly.

Q. What was your age when you completed your apprenticeship in Albuquerque, New Mexico?

A. I think I was 20, just past, 21 or 22. Let's see. I started June 5th.

Q. June 5th of what year?

A. 1899, and four years later I was awarded a diploma for serving my apprenticeship. Was bound in the trade by the Santa Fe Railroad to finish my trade, and I had to serve the four years because they held out, oh, a small amount of money each day for four years, out of your wages.

Q. What was the reason for that, to keep you employed? A. To bind you to the trade.

Q. Now, we have got you down to Winslow, Arizona, some time in 1903 or 1904. [3834-5]

Mr. Lyon: We have not established yet when he was in Winslow, Arizona.

Q. (By Mr. Scofield): When were you in Winslow, Arizona?

A. It was in 19—let's see, I think it was December, 1904.

Q. 1904?

A. Let me see, yes. I am pretty sure that is the date, although I may be off, though, but it is pretty close.

Q. Where did you go from Winslow, Arizona?

A. Los Angeles, California.

(Deposition of Chris Nelson.)

Q. How were you employed there?

A. By the Southern Pacific Railroad, here in Los Angeles.

Q. As a machinist? A. Yes.

Q. Where were the shops located?

A. Down on the east side of Los Angeles, where they are today.

Q. How long did you remain with the Southern Pacific here in Los Angeles?

A. About five or six months, something like that.

Q. Where did you go next?

A. I was sent to Bakersfield, the same railroad.

Q. Southern Pacific?

A. Southern Pacific. [3834-6]

Q. Do they have shops there? A. Yes.

Q. You were still employed as a machinist?

A. Oh, yes.

Q. How long did you remain with the Southern Pacific here in Los Angeles?

A. About five or six months, something like that.

Q. Where did you go next?

A. I was sent to Bakersfield, the same railroad.

Q. Southern Pacific? A. Southern Pacific.

Q. Do they have shops there? A. Yes.

Q. You were still employed as a machinist?

A. Oh, yes.

Q. How long did you remain at Bakersfield?

A. Oh, until 19—with this same S. P. Railroad?

Q. Yes, if you did remain with them.

A. Until 1906, I believe it was, the latter part of 1906.

(Deposition of Chris Nelson.)

Q. Then where did you go?

A. Winslow, Arizona.

Q. How long did you remain in Winslow?

A. Oh, about a year, I think I was at Winslow—
not Winslow; Douglas, Arizona, pardon [3834-7]
me.

Q. Douglas, Arizona?

A. Pardon me on that.

Q. Still with the Southern Pacific?

A. No, that would be the—it was not the Southern Pacific. It was a branch line or extension of the Rock Island Railroad, and it was the El Paso and Southwestern Railroad, which is now owned by the S. P.

Q. You were still working as a machinist in their shops?

A. Yes, sir.

Q. From Douglas, Arizona, where next did you go?

A. Oh, I don't know, let's see.

Q. What year was that you were in Douglas?

A. I left there in 1907, and I took a trip around the country a little bit, and I just forget now where I landed the last time. I think I landed in Bakersfield eventually.

Q. You came back to Bakersfield?

A. Yes, my home. My father and mother were living and lived in Bakersfield.

Q. Did you go back to work in Bakersfield?

A. No, not at that time I did not.

Q. Where did you go back to work next after you left Douglas in 1907?

A. Oh, that was Bakersfield. [3834-8]

(Deposition of Chris Nelson.)

Q. You came back to Bakersfield and went to work?

A. Yes, after a trip around a little bit, you know, I finally landed in Bakersfield.

Q. Who did you go to work for in Bakersfield?

A. Southern Pacific.

Q. About what year was that?

A. It was, oh, along in 1907, the latter part, or first part of 1908, I believe.

Q. How long did you continue to work then in Bakersfield after you took this employment in 1907 or 1908?

A. Oh, I didn't stay very long. I was sent for to come down to the S. P. at Globe, Arizona.

Q. You were in Globe, Arizona, for a while?

A. Yes, a short time.

Q. Then where did you go?

A. I can't just remember. I can't remember all those dates so far back.

Q. I do not care so much about the dates if you will just give me the sequence of the places where you worked.

A. Yes.

Q. From Globe where did you go?

A. From Globe I think I went back to Bakersfield, if I remember right.

Q. You went back to Bakersfield?

A. I worked there several times, and I think my [3834-9] father had sent for me to come back. He was working in Bakersfield.

Q. What trade was your father in?

A. He was a machinist also.

(Deposition of Chris Nelson.)

Q. Did you have any brothers or sisters?

A. Yes, there was seven boys in the family and two girls, none living today.

Q. Were any of the boys machinists?

A. But one sister—one sister living.

Q. Were any of the boys machinists besides yourself? A. Yes, four.

Q. Four besides yourself? A. Yes.

Q. Well, after you got back to Bakersfield say in 1908 or thereabouts—— A. Yes.

Q. ——from Globe, how long did you continue there, or where next did you go from Bakersfield? Maybe you can remember that. After you had been in Globe, Arizona, and you came back to Bakersfield where next did you go, do you recall.?

A. Let me see. Oh, my father was in—had changed to go to work for the Missouri Pacific Railroad at Osawatomie, Kansas.

Q. Who had any shop at Osawatomie? [3834-10]

A. Missouri Pacific Railroad.

Q. You worked there for a while?

A. Yes.

Q. Was your father there? A. Yes.

Q. Then where did you go after you left Osawatomie?

A. I worked in—just a moment, I worked in some of these places twice, so I can't—it is pretty hard in the later years to remember how all the incidents happened, but from Osawatomie I can't just remember the next place I did go.

Q. When did you get back to Bakersfield on the next occasion?

(Deposition of Chris Nelson.)

A. The next occasion I came back there in—I was there in 1911.

Q. 1911? A. Yes.

Q. How long did you remain there after 1911?

A. Remained in Bakersfield?

Q. Yes.

A. Just a short time. I was in a—I had a small machine shop there, rented it, doing machine work and some automobile work, and I wanted to come back in the oil fields and I went up to Taft to the Standard Oil Company.

Q. What did you do during the first World War, during [3834-11] 1916, 1917 and 1918?

A. I worked up in San Francisco, in the shipyards.

Q. In the shipyards? A. Yes.

Q. Doing what?

A. Well, I was on submarines for a while, building submarines, helping to, and doing general machine work, marine work, you know.

Q. You remained there during the first World War?

A. No, I didn't stay all the time. I had enlisted in San Francisco, and I stayed there until, I think it was September, I forget now. My wife can tell you more about the date. What was that date?

Mrs. Nelson: I am not on the stand.

Q. (By Mr. Scofield): She is not on the stand.

A. I can't remember just the date, but, anyway, I think 1918, with the flu epidemic, I had a touch

(Deposition of Chris Nelson.)

of flu, and my wife and girl was with me, and so I left there after that flu epidemic.

Q. You were married prior to the first World War? A. Yes.

Q. What year were you married? A. '15.

Q. 1915? A. Yes. [3834-12]

Q. What service did you enlist in during the first World War? A. Motor transport.

Q. Motor transport?

A. The machine end of it.

Q. After you had worked in the shipyards in San Francisco where did you go from there?

A. I came back to Bakersfield.

Q. You came back to Bakersfield?

A. Really a sort of a home place for us.

Q. How long did you remain in Bakersfield after 1918?

A. Well, I remained in and around Bakersfield, in fact, in Kern County for, oh, quite a while. I can't just remember now.

Q. Do you know where you were in 1933, 1934 and 1935? A. Yes.

Q. Where were you? A. Bakersfield.

Q. What were you doing?

A. Doing machine shop work as a machinist.

Q. With whom?

A. Well, I had other—Had several different jobs in there also.

Q. How do you know that you were in Bakersfield during 1934, for instance, and 1935? How can you fix that circumstance? [3834-13]

(Deposition of Chris Nelson.)

A. Well, there was a period of depression that we always have in mind, you know, and there wasn't much work around the country, and I was in Taft and had applied for a job at Bakersfield, and got a job in there with the California Sales and Service Company.

Q. What business were they in?

A. They were in the general sales and machine shop and welding work.

Q. What work did you do for them?

A. Oh, general machine shop work, running the machines or repairing.

Q. This you say was California Service and Sales or Sales and Service?

A. California Sales and Service.

Q. Do you remember when you went to work for that organization?

A. Yes, I think I can. It was, I think it was the—in '34.

Q. 1934? A. Yes, '34.

Q. How long did you remain with them?

A. I remained with them—I can't just remember.

Q. Was it a matter of a year or six months?

A. Yes. [3834-14]

Mr. Lyon: I object to prompting the witness.

The Witness: It was less than a year.

Q. (By Mr. Scofield): Less than a year?

A. Yes.

Q. Then who did you go to work for?

(Deposition of Chris Nelson.)

A. I went to work for the Standard Pipe & Supply Company.

Q. Who was the head of that organization?

A. Well, the yard—it was a secondhand sales yard, used equipment yard—it was owned by a man by the name of Abie Fishfader, Abraham Fishfader.

Q. Did he have a machine shop there in Bakersfield?

A. No, he bought a machine shop that was set up in McKittrick belonging to the Standard Oil Company. This shop was out at a little—you might say outer end of McKittrick, a little place called Reward.

Q. Reward? A. Reward, California.

Q. Where is McKittrick, California, with reference to Bakersfield?

A. McKittrick is—if Taft is 16 miles it would be, oh, 25 miles, I guess. I don't know the exact distance.

Q. Is it near Taft?

A. 16 miles from Taft. [3834-15]

Q. 16 miles from Taft? A. Yes.

Q. Well, now, what was your work about this machine shop that you started working in? I believe you said that Mr. Fishfader was the proprietor?

A. Well, I oftentimes had quite a bit of work to do there in the mechanical line. He had trucks and cars, and so forth, in his business, and he also had a machine, a hydraulic machine for straightening pipe which had to have some attention sometimes, and I had to work on that pipe straightener one

(Deposition of Chris Nelson.)

time and make some parts for it, and we got discussing about a machine shop, and he said he was going to buy a machine shop, and did buy this one in Reward and moved it in.

Q. Who moved it in?

A. Well, I helped part of it. My brother was hired, also a machinist, to disassemble it at McKittrick and set it up in Bakersfield.

Q. What is your brother's name?

A. Walter.

Q. You went with your brother over to McKittrick?

A. No, I didn't go over there at all. My brother took it all down alone and moved it in, and I helped fix the machinery and so forth and so on.

Q. Did you help set it up in [3834-16] Bakersfield? A. Yes, both of us set it up.

Q. How long then did you work for Fishfader in this machine shop that I believe you designated—by what name was the shop known as?

A. The shop name—when I went in there I went in as a—we struck up a little partnership of—I would do the work and we would split the profits to us.

Q. Who were the other partners?

A. He and myself, Mr. Fishfader and myself.

Q. You were two partners?

A. Yes, on the machine shop part I would get half of what—of the net, you know, that I would do, but other than that, if I was working on my own salary I got a salary of \$10 a day.

(Deposition of Chris Nelson.)

Q. Who paid you? A. Mr. Fishfader.

Q. How long did you continue this partnership arrangement with Mr. Fishfader in Bakersfield?

A. Oh, not so very long. It all depended on the business conditions and the work coming in the shops, you know, and the time that he couldn't feel like he could pay me and, you know, maybe not anything would come in for profits, so we really dissolved and cut that part out.

Q. My question was: how long did it continue, do you recall? [3834-17]

A. Oh, it probably continued a year and a half or two years.

Q. Starting in when, starting what year?

A. In about '34.

Q. You continued with him until when?

A. Well, I think it was 1930—I think it was about '37, the latter part of '37, if I remember right.

Q. That would be a matter of three years?

A. About three, yes.

Q. How do you fix this date when you started to work with him? Was it by this McKittrick business?

A. Yes, from what it was—the business had started to pick up a little bit.

Q. What business?

A. The oil field business and machine shop business, and when I went to him it had picked up somewhat, and I thought it was a good idea to go there and get in it, you know, in a way for myself, too,

(Deposition of Chris Nelson.)

you see, and then it dropped. The business in the oil fields and in the machine shop business all depends on the work, you know that is to be had around the country.

Q. What I am trying to find out is how you fix the date when you first started in business with Mr. Fishfader. You say it was some time in 1934?

A. Yes. [3834-18]

Q. How are you able to fix that date, is it just from recollection or is it——

A. No, I have to—it was a matter of a little guesswork on that part. I can't, you know, just remember dates and all that so far back, but it is——

Q. How are you able to fix the date when you terminated your arrangement with Mr. Fishfader some time in 1936 or 1937?

Mr. Lyon: That is objected to as a misstatement of the witness' testimony. He said it was in 1937, not anywhere near 1936.

The Witness: How did I happen to terminate, you say?

Q. (By Mr. Scofield): No, I say how do you fix the date when you terminated your partnership with Mr. Fishfader? How are you able to establish that date?

A. Well, let me see, it takes a little time to think all that up. I have got to think back on all these different shops, and I can't just remember that, how I fix those dates.

Q. Do you recollect any circumstance, either in

(Deposition of Chris Nelson.)

your family or any other circumstance that you recall the period when you worked for Mr. Fishfader?

Mr. Lyon: I object to the leading of the witness. The witness has already stated he can't remember.

The Witness: I can't just remember. [3834-19]

Q. (By Mr. Scofield): Have you any recollection of meeting Mr. Hall during the time that you were working for Mr. Fishfader?

Mr. Lyon: That is objected to as leading, grossly so.

Q. (By Mr. Scofield): Do you have any recollection of that?

A. Oh, I had a recollection of meeting Mr. Hall from the—he used to come into the California Sales & Service when I was working there.

Q. What would he be coming in there for?

A. It was a machine shop and welding shop, and for repairs to his drilling job, and so forth.

Q. Did you ever do any work for Mr. Hall?

A. Yes.

Q. What sort of work?

A. Oh, it is hard to remember, just various things brought in that I would repair.

Q. Do you recall anything he ever brought in that you repaired?

A. That is pretty hard to say, so many things to be repaired around rigs. I wouldn't remember that.

Q. Did you ever make anything for Mr. Hall there in the shop? A. In which shop?

(Deposition of Chris Nelson.)

Q. In Mr. Fishfader's shop.

A. Oh, yes. [3834-20]

Q. What did you make for him?

A. I made some scratchers for him.

Q. What were the scratchers, can you describe what they were?

A. Well, the part that I made was taking a casing collar and boring it out or reaming or drilling out, whichever you want to say, to slip over the o.d. of the pipe.

Q. How many of those did you make?

A. six.

Q. Do you know what you made them out of?

A. Yes.

Q. What did you make them from?

A. I made them out of five and three-quarters couplings, casing couplings, or collars.

Q. Do you know where you got those couplings from?

A. Mr. Hall furnished them.

Q. Did he bring them into the shop?

A. Yes.

Q. Did he give you any instructions as to what he wanted done with those casing collars?

A. Yes.

Q. Relate as well as you can what instructions he gave you with regard to working on these couplings when he brought them into the shop.

A. Well, he verbally gave me the order, so to speak, [3834-21] to make these up, drill them out and machine them to—instructed me to fit the casing loose, and to drill them to the—to drill holes to fit a

(Deposition of Chris Nelson.)

certain wire which was about a sixteenth of an inch in diameter, piano wire.

Q. Did he give you any of the wire?

A. Yes, a sample.

Q. Where did he tell you to drill these collars or casing couplings?

A. He told me—to drill them?

Q. Where did he say to drill them?

A. They were to be drilled right over the slot that was put on the inside. I put them on the inside of each one.

Q. What did he tell you to put a slot on the inside for, did he tell you?

A. Yes, to accommodate the wire and hold it, so that they could lock the wire on the inside.

Q. Now, after he brought these couplings into your shop what did you do?

A. Well, I proceeded to bore them out and machine them, ready for the wire.

Q. Were these couplings threaded on the inside or not?

A. Yes, all couplings are threaded on the inside, screw couplings. [3834-22]

Q. Did you bore out these threads?

A. I bored the threads out, and would be large enough to go over the o.d. of the pipe, which was five and three-quarters.

Q. After you had bored out the inside of the couplings what did you do then to the couplings?

A. Put the slots in for the wire.

(Deposition of Chris Nelson.)

Q. Won't you explain just what these slots were?

A. It is a grooved slot to accommodate whatever the purpose it is for.

Q. The grooved slots were made on the inside or outside of the coupling? A. On the inside.

Q. How many of these grooved slots were made on each coupling? A. Three.

Q. Did he tell you to make three? A. Yes.

Q. You have indicated that you drilled holes in these couplings? A. Yes.

Q. Where were the holes drilled?

A. Well, the holes are drilled to match the grooves on the inside, drilled from the outside to the inside, naturally. [3834-23]

Q. What do you mean "to match the grooves on the inside"?

A. The wire that was to be inserted through the hole and crimped to go into the slot to hold it.

Q. Mr. Hall explained this to you?

A. Yes, sir.

Q. You have indicated in one of your previous answers that these holes were drilled through the couplings to match the groove? A. Yes.

Q. Each one? A. Yes, sir.

Q. How many of these holes were there into each groove?

A. Well, I was told to drill them about an inch apart or inch and a half, or such a matter, an inch apart is about what it was, and putting the holes in each of the three slots through from the outside to this in the slot.

(Deposition of Chris Nelson.)

Q. How were these holes spaced around the couplings?

Mr. Lyon: That is objected to as leading.

Q. (By Mr. Scofield): Go ahead and answer the question.

A. They were spaced certain distances around the coupling, naturally; center punched on each outside diameter of the coupling to match the hole or slot on the inside of the coupling. [3834-24]

Q. Now, let us assume that you have received these couplings from Mr. Hall, and you have bored them out, as you have indicated you have, bored the threads out of the inside of the couplings, and you have made these three grooves, as you have indicated in your previous answers, around the inside of the coupling. Now, won't you explain to me just how you put the holes in into the couplings, how you went about putting the holes in and how the holes were drilled by you in each one of these couplings? A. Yes.

Q. Can you just set it up as you did in the shop, and explain how you drilled these holes?

A. Well, in machining the coupling on the inside with the three grooves, the space between each slot on the inside of the coupling, I took the same center of each one of these slots and put a fine line on the outside to match that inner slot.

Q. That is, the groove on the inside?

A. Yes, to match the groove on the inside.

(Deposition of Chris Nelson.)

Q. You had a line around the outside of the periphery—— A. Yes.

Q. ——of the coupling? A. That's right.

Q. To match the groove on the inside? [3834-25]

A. Yes.

Q. Now, what did you do?

A. Then I spaced the holes and drilled the holes on a drill press.

Q. How did you go about spacing those holes?

A. Well, in very accurate cases, where you have to be accurate, you generally use a pair of——

Mr. Lyon: He didn't ask you what you generally used, he asked you what you did.

The Witness: All right, I spaced those holes with just a rule or a scale, measuring scale.

Q. (By Mr. Scofield): Then what did you do after you got the holes spaced, did you mark them?

A. That is marking them, you see.

Q. All right. A. That is marking.

Q. Where were these marks?

A. They were right in this here line that I drew on the outside.

Q. On the outside? A. Yes, sir.

Q. Then what did you do after you had marked each one of these lines around the outside of the coupling?

A. And then you have to drill the holes, so naturally you go to a drill press, a machine that spins a small [3834-26] drill, or any drill, as fast as the job requires and then you proceed to put this coupling that you are drilling in what they call a

(Deposition of Chris Nelson.)

V block, and then you proceed then to drill, and you can just rotate your coupling from each hole that is marked to be drilled, and proceed with your drilling and drill through.

Q. Was the hole drilled completely through the coupling?

A. Just through the wall of the coupling.

Q. Through one wall? A. Yes.

Q. What size did you make that hole?

A. Oh, just a trifle larger than the wire to be inserted.

Q. How did you know what size to make it?

A. I had a piece of the wire.

Q. Who gave you that wire? A. Mr. Hall.

Q. Did he give you enough wire to fill all the holes or just one piece of wire, or how much wire did he give you?

A. No, he gave me quite a piece of wire, quite a length.

Q. What do you mean by that?

A. A coil, it comes in a coil. I don't [3848-27] know how much would be in it, maybe 40 feet.

Q. Well, you selected a drill the size of the wire?

A. Yes.

Q. Or larger?

A. Well, it would be large enough to accommodate the wire to go in there fairly free, and they have instruments for gauging wire and also for gauging drills, so you select the drill that is the least bit larger to slip through. My mouth is so dry I can't hardly talk.

(A discussion was had off the record.)

(Deposition of Chris Nelson.)

Q. (By Mr. Scofield): About how many holes were there on each one of these lines that you made on the outside of the coupling?

A. For each groove?

Q. For each groove, about how many holes were there around the coupling?

A. Oh, there was probably 20, I can't remember the amount.

Q. After you had drilled these holes opposite the different grooves in the coupling then what did you do? You have still got it on the V block or the drill press, I guess, when you were drilling these holes. Then what did you do after that?

A. Well, then I would insert the wire and take a [3848-28] punch or a cold chisel and slip the wire through into the slot and bend it over into the slot and get it fastened and batted the slot over the wire to hold it in.

Q. Now, on these first six couplings that Mr. Hall left with you did you put the wires in them or not?

Mr. Lyon: We object to that statement with regard to the number. No such number has been testified to.

Q. (By Mr. Scofield): Didn't you say in one of your previous answers how many of these couplings Mr. Hall left with you? A. Yes.

Q. Do you recall that he left six?

A. Yes, yes, sir.

Q. You do have a definite recollection——

A. Yes.

(Deposition of Chris Nelson.)

Q. —that he left six?

A. Yes, it is really an unusual amount and type of a job that I never had done before.

Q. Did you put the wires in these six couplings after you had drilled them?

Mr. Lyon: That is objected to as leading.

Q. (By Mr. Scofield): Do you have any recollection about that? A. On these? Yes, I did.

Q. You put the wire in these six [3848-29] couplings? A. Yes.

Q. After these couplings were finished what did you do with them then?

A. I delivered them out to the Weed Patch District where he was working.

Q. Did you deliver them to the well where he was working? A. Yes.

Q. Who did you deliver them to?

A. Well, somebody at the well, and I don't remember now who it was, and he knew about it, so I just left them there.

Q. What time of day did you deliver them out there?

A. Well, it was after my working hours, which was—I got through in the shop about, oh, some time after 5:00 or such a matter.

Q. What kind of a vehicle did you take them out there in?

A. In my car, a Hudson, a Hudson coupe.

Q. When did you buy that Hudson, do you know?

A. In '36.

(Deposition of Chris Nelson.)

Q. 1936? A. Yes.

Q. What part of 1936?

A. Let's see, '35. [3848-30]

Q. What part of 1935?

A. I don't remember the date, the month, even the date.

Q. When did you sell it?

A. I sold it about, oh, two or three months back.

Q. This year? A. Yes.

Q. Had you been using it ever since?

A. Mostly, yes.

Q. Did you ever see these cylinders that you made for Mr. Hall after you delivered them to the well? A. No.

Q. You never saw them after that? A. No.

Q. Did you ever see them put on any pipe?

A. No.

Q. You never saw one of those after you delivered them to the well? A. No.

Q. When next did you ever hear, if you did, about a device of this sort?

Mr. Lyon: That is objected to as leading, assuming a fact not in evidence.

Q. (By Mr. Scofield): After the manufacture or the making of these first cylinders for Mr. Hall did you ever [3848-31] have occasion to make up any like them? A. Yes.

Q. When?

A. Oh, about two years and a half ago or so, such a matter.

(Deposition of Chris Nelson.)

Q. Just explain the occasion of your making up any of those cylinders on another occasion.

A. Mr. Hall's son George called me up from Bakersfield, I being in Taft, and asked me if I had—if I would remember making up the scratchers for his father, and I told him; yes, it was quite a long time back, but I remembered it, I remembered making them. So then he asked me if I would make one like the ones I made. He asked me if I could do so, and I said yes, I thought I could, and did make up one.

Q. Did you talk to Mr. George Hall on the phone? A. Yes.

Q. Did you see him at that time?

A. I don't remember. I don't believe I did see him, not face to face, no.

Q. Your only contact with him was over the phone? A. That's all at that time.

Q. After he talked to you on the phone what did you then do?

A. Well, I proceeded to make this scratcher. I had [3848-32] to make a sleeve, and I couldn't find a collar that was five and three-quarters for the proper dimensions, but I had a forging, a steel forging that was suitable with some material to be removed from also the inside and outside, and I made it up to the best of my knowledge of the way I had made those first six.

Q. Did anybody help you, that is, did anyone give you any instructions as to how to make this up?

A. This one? No. You mean this last one?

(Deposition of Chris Nelson.)

Q. Yes, the last one. A. No.

Q. After you had made up the scratcher what did you do with it?

A. Well, it was made up and I inserted the wires in it, and a man that works for Mr. Hall, Mr. Moody, came and picked it up and paid for it at the time.

Q. What did he pay you, do you recall?

A. Well, it was paid the company I worked for there, I worked for at that time in Taft, The American Oil Tool Company, in Taft.

Q. About how long ago was that?

A. Oh, it is two years and a half back.

Q. Did you see Mr. George Hall when you delivered this to Mr. Moody? Did Mr. George Hall come with Mr. Moody to get the scratcher? [3848-33]

A. No, Mr. Moody came there alone to get it.

Q. Have you seen Mr. George Hall prior to his death some two or three years ago? A. No.

Q. When did you see him?

Mr. Lyon: That is objected to as leading, grossly so.

Q. (By Mr. Scofield): When did you see Mr. George Hall last, do you recall?

A. Oh, it was back along in those days when I worked in Bakersfield, I can't just remember.

Q. When you were working for Fishfader?

A. Well, yes.

Q. I put before you a cylindrical object, and ask you whether or not you can identify it.

A. Yes, I can.

Q. What is it?

(Deposition of Chris Nelson.)

A. It is the so-called scratcher.

Q. What scratcher is that, do you know?

A. Well, I don't know, only I was ordered to make it, to make that very scratcher by Halls.

Q. By which one? A. By George Hall.

Q. Can you identify this scratcher as the one you made two years ago or so?

A. Yes, I can. [3848-34]

Q. Will you look it over very carefully, and see whether or not you can identify it?

A. Yes, I can positively identify it.

Q. How are you able to identify that as the scratcher that you made for Mr. George Hall?

A. Well, I made that on what you might call a light lathe. We also have a heavy lathe in that same shop, but I remember I—it was very close—this here was to this. The forging I made it out of was close to the size that I had finished that to, and it was all practically fine, what we call fine thread work, fine feed work on a small lathe, and if I had made that on a larger lathe it would have taken larger cuts, and so forth and so on.

Q. This particular scratcher appears to have been painted with aluminum paint? A. Yes.

Q. Who did that, do you know? A. I did.

Q. You did that?

A. Yes, at least it was painted aluminum when it left the shop there because we—many new pieces of machinery and equipment that we make and repair, they are generally cleaned up and sometimes painted, not always but many times.

(Deposition of Chris Nelson.)

Q. In regard does this particular [3848-35] scratcher resemble those that you made for Mr. Hall back during the time you were working in Mr. Fishfader's shop?

Mr. Lyon: That is objected to as calling for a conclusion of the witness and as incompetent, irrelevant and immaterial.

The Witness: Well, I think it is exactly the same, because that is all I can remember about it.

Q. That is your best recollection——

A. Yes.

Q. ——of how the first ones were made?

A. Yes.

Q. How did you know how to put these wires into this particular scratcher?

A. Well, Mr. Hall told me how to put those in in the very first place, on the very first ones that were made, how to put them in. I understood how they were to be put in.

Q. How did you know the length of the wires, that is, did he instruct you as to that, or was that some of your own——

A. No, George Hall told me to make them about three inches long.

Q. That is, the selection of the length of the wires was not your particular idea?

A. No, it wasn't. [3848-36]

Q. Did Mr. Hall ever tell you how these were going to be used, or not?

Mr. Lyon: Objected to as calling for hearsay.

(Deposition of Chris Nelson.)

The Witness: No, he never did. It didn't interest me anyway.

Q. (By Mr. Scofield): Do you know anything about oil production? A. Very little.

Q. Do you have any hesitation whatsoever in identifying this as the scratcher that you made for Mr. George Hall?

Mr. Lyon: That is objected to as leading and suggestive, incompetent, irrelevant and immaterial.

The Witness: It is the same one.

Q. (By Mr. Scofield): It is the same one?

A. Yes.

Q. Did you know any of the people who were working with Mr. Hall at Bakersfield on this well that he was drilling?

Mr. Lyon: That is objected to as leading and suggestive, also assuming a fact for which there is no evidence.

The Witness: Well, I don't anyway, only his son is the only man I know, connected with Mr. Hall.

Q. (By Mr. Scofield): Which sons? [3848-37]

A. I know Dub or George.

Q. Did you know any of the other boys?

A. Just by sight is all. [3848-38]

* * *

Q. Mr. Nelson, you had a stroke about a year ago, is that correct? A. Yes, sir.

Q. How did that stroke affect you?

A. It left my left side—my hand mostly is both-

(Deposition of Chris Nelson.)

ered, and a certain amount of numbness on my face on the left side.

Q. It also affected your memory, too, didn't it?

A. Well, possibly, I can't say.

Q. That is, it partially paralyzed your face and your left side? A. Yes.

Q. How long did that condition of partial paralysis exist?

A. Oh, I was in the hospital for about two weeks, and then when I came home, why, I couldn't work or do anything like that, and I would just lay around, and my condition seemed to improve from then on until now, you might [3848-39] say.

Q. You haven't been able to do any work——

A. No.

Q. ——of any kind since then? A. No.

Q. In fact, you tire very rapidly at the present, time don't you? A. Yes, I do.

Q. How long did you work in the oil fields as a machinist in all of your different jobs?

A. In all—you mean in all my total time in the oil fields only, you mean?

Q. Yes.

A. Well, I would have to stop and add up a little bit there. I just don't—offhand it would be in the neighborhood of, oh, I would say 30 years.

Q. 30 years? During that 30 years you made a lot——

A. Maybe a little less than 30 years. I wouldn't just say for sure 30 years.

Q. During that period of time of approximately

(Deposition of Chris Nelson.)

30 years as a machinist you fabricated for different people a lot of different structures, didn't you?

A. Yes, sir.

Q. From the beginning of that 30 years until the time of your stroke about a year ago? [3848-40]

A. Yes, that would be up to then, yes.

Q. Can you tell me what some of those other particular devices were?

A. Of what, you mean?

Q. Well, you made for other individuals.

A. Oh, I have manufactured and worked on most all of the used tools today in the oil business.

Q. And you have made different models for different individuals of those tools over this period of 30 years?

A. Not so many models. I have made tools to be used, you know, used tools.

Q. I did not mean models in the sense they were demonstration models, I mean they were actual tools, but they were what you thought were new tools at that time; isn't that correct? They were new in the sense you had never seen anything like them?

A. Some I had worked on.

Q. How many altogether has there been over that period of 30 years?

A. Well, there was ever so many tools, tools used in the oil industry, improvements and patented tools, you know, that I never probably—I don't have any occasion to see or to do any work on them.

(Deposition of Chris Nelson.)

Q. I am talking about the ones that you did work on.

A. That I did work on? Oh, I worked on all— [3848-41] practically all the drilling tools and oil pumping equipment, you know, such as pumps and sucker rods and polish rods, and so forth and so on, that goes with the pumping of oil wells.

Q. Can you offhand tell me the construction of any one of those structures you worked on, say 20 years ago?

A. 20 years ago? Could I ask your name?

* * *

Q. (By Mr. Lyon): A new type of tool.

A. New type of tool?

Q. That was new to you.

A. Well, I could name this scratcher, for one.

Q. I am asking you about any other?

A. Any other? Yes?—tools or equipment either?

Q. That is right.

A. There would be one tool that the Shaffer Tool Company used to make, was a rod turner, that was new when I worked on it.

Mr. Scofield: That is the Shafter—

The Witness: Shaffer Oil Tool. [3848-42]

Q. (By Mr. Lyon): What was the particular tool?

A. It was a device for rotating the rods in pumping.

Q. How many of those tools did you make?

(Deposition of Chris Nelson.)

A. Oh, offhand, I would say I made part of probably 25 or more.

Q. All the same? A. Yes.

Q. Could you duplicate that structure right now?

A. Yes, I could.

Q. What was the particular structure?

A. The structure was the device that had a hole through the whole assembly—the whole tool had a hole all the way through it, that meant through the body, and then this body was threaded with a coarse threaded screw, coarse lead.

Q. What were the dimensions of the device?

A. Well, the dimension of the screw was about, I would say around three or three and a half—three and a half, I would think.

Q. You think it could have been——

A. Well, I can't remember sizes, you know; after working with so many sizes I can't remember all sizes.

Q. You can't remember the size of the hole through the device, can you?

A. To a fine limit tolerance that—I don't know that [3848-43] I could just give you the exact size.

Q. You can't recall the particular shape of the body in all its particulars, can you?

A. I can pretty close. Come to think about it, I can tell you the size of the hole also, approximate size. It was to accommodate what they call a polish rod.

Q. You were recollecting then what, the then current size of a polish rod; is that correct?

(Deposition of Chris Nelson.)

A. Yes.

Q. And fixing the size of the hole through that device by what you recollect the polish rod was then?

A. Well, they are generally about a one and one-eighth or maybe larger, so that the hole would have to accommodate slipping over that.

Q. By deduction backwards the hole would have to be the size of a one inch and an eighth, or a larger size polish rod? A. Yes, sir.

Q. Depending upon which one it was?

A. Yes, sir.

Q. There was more than one size polish rod, too, wasn't there? A. Yes, sir.

Q. By that you can't determine the size, can you, whether it was this inch and an eighth or the larger size [3848-44] polish rod?

A. I wouldn't know that.

Q. Can you remember precisely when that device was made, within a matter of three or four or five years?

A. Yes, I believe it was along—I don't know when the Shaffer brought the idea out, but I know when I worked on it.

Q. Can you establish that in your mind other than by guessing within a matter of two or three years? A. Yes, sir.

Q. How?

A. Well, I was working for Shaffer then.

Q. You were working for the Shaffer Oil Tool Company? A. In Taft, yes.

(Deposition of Chris Nelson.)

Q. So that you know it was during the period of time you were working for him? A. Yes.

Q. How long were you working for him?

A. Oh, I don't remember how long I did work for Shaffer's. I worked for them two different times.

Q. Do you know which time it was?

A. Yes, the first time I worked for them.

Q. You don't know how long it was?

A. Probably a year, or such a matter. [3848-45]

Q. You have made other devices for Mr. Hall, haven't you?

A. No, I don't know whether I have made any other device. I have worked on other tools.

Q. Over what years?

A. Well, it was in the early 1934, I would say.

Q. And on any other type? A. Yes.

Q. When? A. In '35.

Q. When else? A. What else, you say?

Q. When else? A. In 1935, I would say.

Q. When else besides 1935?

A. Oh, 1935? In—about two and a half years back. That would be in 1948, wouldn't it?

Q. Any others? A. No.

Q. You never did any other work for Mr. Hall except in 1934, 1935 or 1949?

A. Yes, I worked in there about two years and a half back, the last time I did anything for them.

Q. Was it in 1949 or 1948?

A. I don't remember the date. It was just pretty recent, [3848-46] too.

(Deposition of Chris Nelson.)

Q. You can't remember whether this work you did for Hall was in 1948 or 1949?

A. To be positive, I couldn't say exact the date.

Q. You don't know what part of the year it was?

A. It was in the forepart of the year, probably middle part of the year.

Q. So that it was either the forepart——

A. It would have been the middle part of the year, I would say.

Q. Either the forepart or middle part of 1948 or 1949? A. Yes, sir.

Q. That is as close as you can fix this last work you did for Mr. Hall? A. Yes, sir.

Q. In this last work you did for Mr. Hall, you talked to nobody at any time about what you were to do, except a telephone conversation with George Hall, who told you to make a device like you had made for him before; is that correct?

A. That's right.

Q. Nobody told you the size of the wires, the length of the wires, how they were fastened, the size of the collar or anything else? [3848-47]

A. No.

Q. Nobody told you that the wires should be three inches in length?

A. Only Mr. George Hall told me that.

Q. How much more did Mr. George Hall tell you? A. That's all.

Q. He never told you how the wires went through, how they were secured to the collar?

(Deposition of Chris Nelson.)

A. Only gave me a sample of the wire to make it.

Q. He gave you in 1948 or 1949 a sample of this wire? A. Yes.

Q. You had no recollection of what the size or shape of that wire was before that, did you?

A. Yes, I knew about what the size was.

Q. About? A. Yes.

Q. But you did not know whether that was a sixteenth, three thirty-seconds or five sixty-fourths or something of that character, did you?

A. Well, I don't know exactly. I don't have any wire gauge, those dimensions, but it would be on the wire gauge, it would be around a sixteenth of an inch.

Q. That is what you used now, is it not?

A. Yes, sir. [3848-48]

Q. But before that you could not have said whether it was a sixteenth, three thirty-seconds, five sixty-fourths or what the wire there was, could you? A. Before when?

Q. Before Mr. George Hall brought you the sample here in 1948 or 1949.

Q. Well, it would be very close to the one-sixteenth.

Q. What do you mean by "very close"? Is three thirty-seconds very close to one-sixteenth?

A. No, it would be more close than that. It would be according to the wire, the gauge measurements. You see, a piano wire comes in certain gauges, wire gauge measurements, so it must be to the wires, so——

(Deposition of Chris Nelson.)

Q. They come in wire sizes, don't they?

A. Yes, they——

Mr. Scofield: Let him finish his answer.

The Witness: And not having too much experience with that, other than making coil springs with piano wire and other spring steel wires, I wouldn't exactly know to a fine degree what the exact size of that wire is, you see.

Q. What sizes do piano wires come in?

A. Oh, I guess they come in many sizes, I don't know.

Q. All up and down the wire scale?

A. I imagine they do, I don't know exactly.

Q. You have no idea of what sizes they [3848-49] are?

A. No, not all, no.

Q. They are measured in numbers and not in units of fractions of an inch, aren't they?

A. I wouldn't be positive, but I think it is measured in wire gauge measurements.

Q. Wire gauges? A. Yes.

Q. Not in fractions of an inch?

A. It could be, I guess, in fractions, too, in their catalog book, but I don't know for sure. I wouldn't have any——

Q. That is, you are familiar with the fact that wire drills, for example, the number set on wire drills range from size 1 to 72, don't they?

A. Well, I imagine they do, yes.

Q. And 1 is larger than 72, is it not?

A. It would be coarser, yes.

Q. It is a heavy—— A. Heavier wire?

(Deposition of Chris Nelson.)

A. Yes.

Q. You have no idea of what the wire gauge number was of the wire that you say you used in 1935?

A. What number I used in 1935?

Q. Yes.

A. No, by wire measurement I don't think that I [3848-50] would know the number.

Q. In fact, you don't know what the wire gauge number is of the wire that is in this model, Exhibit 2, in front of you, do you?

A. No.

Q. That wire was just handed to you by Mr. George Hall?

A. Yes.

Q. Either in 1948 or 1949, when you made this structure?

A. Yes.

Q. Was Mr. George Hall around any of the time that you made this structure?

A. I can't remember whether he was, I don't believe so.

Q. He must have been there one time, when he handed you the wire, wasn't he?

A. Yes. You mean during the time I was making this?

Q. Yes.

A. Oh, he was there to give me the wire.

Q. Now, on how many other times was he there?

A. I could not say.

Q. You could not say? You could not say whether it was one, three, four, two or six, could you?

A. No. [3848-51]

Q. And at the times he was there he discussed the structure of this Exhibit 2 with you, didn't he?

(Deposition of Chris Nelson.)

A. No.

Q. He never discussed it at all? A. No.

Q. He never came into the shop where you were working? A. No.

Q. Where did he hand you the wire?

A. Right there at the shop, at the front end of the shop.

Q. Where you were working?

A. Yes, but I didn't happen to be working on it when he gave me the wire.

Q. How long had you known Mr. George Hall?

A. Since approximately '34, 1934, possibly '33. I don't know just exactly the year, during that period.

Q. Have you any children? A. One girl.

Q. Is she married? A. Yes.

Q. To whom? A. To Mr. J. J. O'Brien.

Q. Who is Mr. O'Brien?

A. He is an accountant for the Standard Oil Company [3848-52] in Taft.

Q. How much did Mr. Hall pay you for making this model, Exhibit 2?

A. I don't know. What he paid me for it—my time card, working time card went into this office where I worked, and the clerk figures it up, and I don't know exactly what the price was.

Q. What was the rate? A. Sir?

Q. What was the rate? A. The ring?

Q. The rate.

Mr. Scofield: You mean the rate per hour?

(Deposition of Chris Nelson.)

The Witness: Oh, the rate per hour is——

Q. (By Mr. Lyon): What was it?

A. Was——

Q. On this particular job?

A. I think three and a half an hour, I believe, machine shop rate.

Q. How many hours did you spend on it?

A. Oh, I would think about four and a half hours or five, I am not positive.

Q. All at one time?

A. Practically, yes, sir.

Q. What do you mean by [3848-53] “practically”?

A. Well——

Q. Did you just start in and finish the device?

A. No, there was—I had another small job that it happened that I had to do that day, and didn’t take very long to do it.

Q. You did this all on the one day?

A. Yes, sir.

Q. Mr. Hall was there that day, wasn’t he?

A. No.

Q. He handed you the wire that day, didn’t he?

A. I don’t think—no, he didn’t hand me the wire. I didn’t start on it that very day he handed me the wire. It was, I think, the following day that I started on it.

Q. Did Mr. Hall hand you a sketch or drawing of any kind to show what he wanted made?

A. No.

Q. Nothing?

A. No.

(Deposition of Chris Nelson.)

Q. He did not sit down and say "Now, you remember this"?

A. No, he didn't. That was taken up before I ever started in on it.

Q. Before you started on it he told you that?

A. Yes, sir—he didn't tell me anything.

Q. He told you the size, didn't he? [3848-54]

A. The size of what, of this particular—

Q. The size of the collar or the sleeve?

A. Five and three-quarters.

Q. He told you that? A. Yes.

Q. What else did he tell you besides the size of the sleeve and the size of the wire?

A. Nothing.

Q. Did he tell you how many wires there were in it? A. No.

Q. You know how many wires are in it now?

A. I do not, unless I count them. I do not really know that.

Q. Do you know how many wires there were in the structure which you say you made in 1935?

A. Not exactly, no.

Q. Do you know whether there is the same number of wires in this Exhibit 2 as there was in this structure that you made in 1935?

A. Approximately the same.

Q. What do you mean by "approximately"?

A. Well, I made a number, maybe—I will say six or ten, six to ten different, probably, more or less.

Q. Did Mr. George Hall before you started on

(Deposition of Chris Nelson.)

this tell you also how many wires there were in that device you [3848-55] made in 1935?

A. No, sir.

Q. Did he tell you how far they were apart?

A. Not in this particular one, he didn't know.

Q. When he gave you the wire and the size and told you the size of the collar he didn't tell you how the wires were spaced?

A. You mean with the very first ones I made?

Q. I mean this one.

A. This one? No, he told me nothing, and this is made from my own knowledge of how I made the other one—the others.

Q. You have told me that several times, you told me he told you nothing. A. Yes.

Q. Now, you tell me that he told you the size of the sleeve and the size of the wires. Now, what I want to know, Mr. Nelson, is actually fully what he told you.

A. Well, just he wanted me to make a duplicate of the scratchers that I made for him back in 1935.

Q. Didn't he identify that scratcher in any way?

A. Well, only by the size, five and three-quarters was all.

Q. And also by the size of the wires?

A. The sample of wire was handed to me by his son. [3848-56]

Q. That is, George Hall?

A. George Hall, yes.

Q. The same George Hall that told you the size of the sleeve that he wanted?

(Deposition of Chris Nelson.)

A. Yes, he did say the size.

Q. All right. Now, how did he identify what he wanted you to make, the size of the wires, position of the wires and manner of mounting of the wires?

A. The only thing he told me was the size of the scratcher he wanted made, to duplicate the ones I had made previously.

Q. And the size of the wire?

A. He handed me the size of the wire, yes.

Q. And that is all he told you?

A. That's all.

Q. Isn't it very possible that your recollection of exactly what happened then is a little foggy?

A. Oh, I don't know, I don't think so hardly.

Q. It could be, though?

A. It could be, probably.

Q. Not only did he tell you the size of the wires and size of the sleeve but he told you the length of the wires, too, didn't he? [3848-57]

* * *

A. That's right.

Q. And he told you the size of the sleeve, didn't he? A. Just the size of the sleeve is all.

Q. And he told you the length of the wire, too, didn't he?

A. He told me the length to cut these wire off on.

Q. To three inches?

A. Yes, approximately.

Q. And you can't remember what else he told you?

(Deposition of Chris Nelson.)

A. No, I don't know any other details that he told me at all.

Q. You would not say he didn't tell you any others? A. About what?

Q. About the structure?

A. No, he didn't tell me. That was up to me to make that. [3848-58]

* * *

Q. (By Mr. Lyon): During your 30 years of machine shop work in the oil tools you made a lot of devices for different people in and around Taft and Bakersfield, didn't you? [3848-59]

A. Yes, sir.

Q. Can you recall two of them now, this scratcher and the rod turner at Shaffer?

A. Yes.

Q. Can you recall any others?

A. Would that be tools on the market or anything, you mean?

Q. I don't know whether they went on the market. I am asking you if somebody came in and they gave you a sketch or a drawing or something and told you to make some particular device, that happened many times, didn't it?

A. Yes, it does.

Q. Can you recall any of them besides this Shaffer structure and this so-called scratcher?

A. Yes, in the last shop I worked, the last place——

Q. When was that?

Mr. Scofield: Just a minute, let him finish.

(Deposition of Chris Nelson.)

The Witness: —we make many kinds of tools, and make a drilling bumper sub.

Q. (By Mr. Lyon): When was that?

A. Oh, we have been making those for the past three years, four years, something like that.

Q. That is, that is what you were making when you ceased to work?

A. No, I wasn't—I worked on many other things. [3848-60]

Q. That was during the last three years——

A. Yes.

Q. ——you worked?

A. Oh, yes, that's right.

Q. But beyond that you can't remember any other structure that you may have made 18, 17 or 20 years ago, except you say this——

A. Well——

Q. ——particular scratcher and that Shaffer rod turner?

Mr. Scofield: I object to that, unless you specify in that question whether you mean a new device or some of the old devices which he has worked on. Evidently the witness, in answering these questions of yours, has thought you meant some of the old devices he worked on.

Mr. Lyon: No, he hasn't thought any such thing.

Mr. Scofield: I want him to understand the question before he answers.

The Witness: Yes.

Q. (By Mr. Lyon): I mean devices that were then new to you.

(Deposition of Chris Nelson.)

A. Oh, that were then new to me?

Mr. Scofield: Now, these devices you are asking about are devices that were made when?

Mr. Lyon: As I said, 17, 18, 20 years [3848-61] ago.

Mr. Scofield: He has already identified one which he made for the Shaffer Company. Do you understand the question?

The Witness: Yes. I worked on many tools that are products of the Shaffer Tool Company at that time.

Q. (By Mr. Lyon): That is, while you were working for Shaffer during that one year?

A. Yes.

Q. But other than that you can't remember anything?

A. Oh, I can—well, we made thousands of flanges for the Government during the World War, the last World War, and many other—we made——

Q. Those were pipe flanges, weren't they?

A. Yes.

Q. During this second World War?

A. We also made, oh, upwards of 12, I will say 11-inch valves for the Government that went on marine work, boats, bronze valves.

Q. This Shaffer rod turner, that also developed into some difficulties, and that was later recalled to your mind, too, was it not?

A. You mean—in what way was it in difficulties?

(Deposition of Chris Nelson.)

Q. You were asked concerning that quite a number of years later, weren't you?

Mr. Scofield: I object to that as indefinite. Asked [3848-62] what?

Q. (By Mr. Lyon): You were asked as to the construction of that rod turner and when you made it quite a number of years later?

A. Yes, I made it quite a few years ago.

Q. You were asked quite a number of years after that when you had made it, how you had made it, and, in fact, that became the subject of a controversy, didn't it?

A. Not to my knowledge. I don't know of any controversy that it ever got into.

Q. Someone came back quite a number of years later and said, "You made such-and-such a device back in 1934 or 1935," didn't they?

A. Somebody came to me?

Q. Yes. A. No, I don't know of anybody.

Q. You don't know of anybody?

A. No, I don't.

Q. Was that a patented structure?

A. To my knowledge, I don't know. Mr. Van Stone was the foreman and was the fellow that instructed us how to make it.

Q. How long did you make that rod turner?

A. Oh, there was about, I would say six other machinists, and so on, in the shop, and we all worked on [3848-63] those.

Q. I see. That was a matter of production that you were making during that year?

(Deposition of Chris Nelson.)

A. Yes, sir.

Q. That you were with Shaffer?

A. Yes, sir.

Q. That was the most outstanding job you were making during that one year you were working for Shaffer?

A. No, they had other—they had lots of other repair work, and so forth, to do.

Q. I mean of production items that you were making for them that was the principal production item that you did machine work on?

A. No, we made lots of flanges and hydraulic nipples and other equipment that goes on Christmas trees, flanges, and so forth.

Q. Did you make more of any other device than you made of the rod turners during that year?

A. Yes.

Q. What? A. Well, it would be flanges.

Q. Flanges?

A. High duty—heavy duty flanges that goes on a well, you know, when it is finished.

Q. Those were just turned flanges? [3848-64]

A. Turned and threaded flanges and making hydraulic nipples.

Q. Either standard flanges and hydraulic nipples, just standard production jobs at that time?

A. They were with Shaffer. They really capitalized on heavy duty equipment for bringing in oil wells.

Q. Well, your answer——

A. Specialized, I mean.

Q. Your answer to the question is yes, that they

(Deposition of Chris Nelson.)

were standard production items? A. Oh, yes.

Q. Did you only talk to George Hall about this so-called scratcher in 1948 or 1949?

A. I talked to him over the telephone.

Q. Did you talk only to him?

A. That's all.

Q. You never talked to Mr. Jesse Hall?

A. No.

Q. You never talked with anyone else, "Do you remember that scratcher I made?"

A. The only man that I talked to about the scratcher was George Hall at that time.

Q. You did not talk to Mrs. Nelson about it at that time? A. No, I don't think so. [3848-65]

Q. You did not talk to anyone else?

A. No.

Q. Except to George Hall? A. That's all.

Q. Who furnished this forging that you say you made this Exhibit 2 out of?

A. The company I worked for then was the American Oil Tool Company at Taft.

Q. How long before this telephone call from Mr. George Hall had it been that you had seen Mr. Hall?

Mr. Scofield: To identify the Hall, you mean——

The Witness: Mr. George Hall?

Q. (By Mr. Lyon): Yes.

A. I can't remember when I saw him after that.

Q. Or before that?

A. That I had seen him before that?

Q. Yes.

(Deposition of Chris Nelson.)

A. I had not seen him, to my knowledge, before that.

Q. You ever had seen him?

A. Well, only many years ago.

Q. He called you on the telephone?

A. Yes, sir.

Q. What did he say?

A. He wanted to know if I remembered making the scratchers for Mr. Hall in Bakersfield. [3848-66]

Q. Did he tell you when?

A. Well, I think we discussed the time, and in the conversation I said that it would be pretty hard, I would have to remember——

Q. Didn't he tell you that——

Mr. Scofield: Let him finish.

The Witness: I would have to remember back a ways to refresh that in my memory how it was made, you know.

Q. (By Mr. Lyon): Didn't he tell you the scratchers that you made for Mr. Hall in 1935, Mr. Nelson? A. Didn't he tell me what?

Q. Didn't he say he wanted you to make a scratcher for him like the ones you made for Mr. Hall in 1935? A. That's right, yes.

Q. And that is how the date was fixed, was it not? A. For 1935, you mean?

Q. Yes, he told you he wanted you to make one like you had made for him in 1935?

A. Well, I imagine that would be the way it was fixed.

(Deposition of Chris Nelson.)

Q. Mr. Nelson, these wires are pushed through the hole in the sleeve, and I am referring to Exhibit 2—— A. Yes.

Q. ——and bent over on the inside?

A. Yes. [3848-67]

Q. And then you take a cold chisel and you push the sides of that groove in for the purpose of clamping the wires; is that correct?

A. That's right.

Q. I notice in the upper row, upper with respect to the tag having Exhibit 2 on it, that there are some extra holes drilled in that with no wires in them. Did you put those extra holes in there?

Mr. Scofield: Do you want to look at it?

The Witness: No, I just—have you got a match? I broke some drills in there.

Q. (By Mr. Lyon): Here?

A. I want to—does that go through? There is——

Q. Your explanation is that——

A. My explanation——

Q. Your explanation for that is that you broke drills off in those holes? A. Yes, sir.

Q. And then moved over and drilled another hole? A. That's right.

Q. Did you do that when you made this device in 1935, you say? A. Break drills?

Q. Yes.

A. Oh, you could, yes. That happens quite often. [3848-68]

Q. Well, did you? A. Yes.

(Deposition of Chris Nelson.)

Q. You broke a lot of drills off in trying to drill the holes?

A. I don't say I broke a lot, because I was very careful, and had a better way to drill that I had out here.

Q. In 1935 machines for drilling were better than they were in 1948 or 1949?

A. No, I would like to explain, the smaller the drill the faster you may speed up your drill, and less chance of breaking the drill.

Q. In this structure of Exhibit 2 these wires extend sideways, up, down, or approximately straight out. Is that the same as it was in 1935?

A. It could be, yes, because the wire is coiled up, and cut it—it had a little bend in it, and it must be perfectly true all the way through in line to come out true with the hole.

Q. So that those wires in that device could be turned in any direction and were turned in any direction when you made it?

A. They would be maybe slightly, just according to the bend of the wire.

Q. And the wire was bent?

A. Well, it is coiled and each would have a little [3848-69] bit of a bend in it.

Q. You did not try to straighten the wire out?

A. No, I didn't do that.

Q. So the wire was bent?

A. Slightly curved, I would say.

Q. And, curving around, there was no effort

(Deposition of Chris Nelson.)

made by you in any of these 1935 devices to determine which way that curve went, was there?

A. No.

Q. That is, it either went up or down or sideways, with reference to the center of the sleeve?

A. It could go any way.

Q. Any way?

A. As far as my part of it.

Q. You are a mechanic, and with this wire secured the way it is in Exhibit 2, and you bend the wire in any direction, that bend is concentrated right at the point that the wire goes through the sleeve, isn't it?

A. It would have to be very tight in order to bend right there. It would have to be firm.

Q. It is firm, isn't it?

A. Well, it is supposed to be, yes, but if there is any lost motion, why, then you would have that to contend with.

Q. If you continuously bend that wire the wire would [3848-70] eventually break off at the point it goes through the hole, wouldn't it?

A. I imagine it would.

Q. Did you make this scratcher for George Hall in 1935?

A. Did I make what scratcher, this?

Q. The ones you say you made in 1935, did you make those for George Hall at that time?

A. I made them for Mr. Jesse Hall.

Q. Who told you what to make in 1935, George Hall or Jesse Hall?

A. Jesse Hall.

(Deposition of Chris Nelson.)

Q. You did not discuss the matter at all with George Hall in 1935?

A. I might have. I don't know, I don't remember.

Q. In fact, you can't remember whether it was George Hall or Jesse Hall you discussed the matter of the scratcher with in 1935, can you?

A. In making the scratchers in 1935?

Q. Yes.

A. I talked with Jesse Hall about those.

Q. And not with George Hall at all?

A. Well, he would be in the shop now and then, but I don't know whether I talked to him about scratchers or what. [3848-71]

Q. At that time in 1935, did you make a guide for Mr. Hall?

A. What sort of a guide would that be?

Q. A spring steel guide?

A. For what, what sort of—

Q. For an oil well guide, to put on a pipe.

A. You mean to put on pipes?

Q. Yes.

A. Well, I don't just remember. I might have. It is pretty hard to say.

Q. You can't remember that, though?

A. Well, I made lots of guides in my time around there, but I can't remember particularly that one.

Q. You can't remember now?

A. I can't remember any particular one.

Q. You can't remember any particular one?

A. No, but I made lots of them.

(Deposition of Chris Nelson.)

Q. And you made lots of them of different constructions, too? A. Yes.

Q. But you can't remember the construction of any of them? A. Of guides?

Q. Yes. A. No, I can't. [3848-72]

Q. You can't remember whether in 1935, in connection with this same well that you say you delivered these scratchers to, that you made spring steel guides for Mr. Hall, either of them, either George or Jesse?

A. I can't remember whether I did. Is that a guide for pipe you are speaking about?

Q. Yes.

A. To lead it in the hole, or centralize——

Q. To centralize it in the hole.

A. No, I don't think I ever made any centralizer guides.

Q. You don't think you ever made any?

A. No, I made them, but not for Mr. Hall.

Q. Did you do any other work for Mr. Hall, in 1935?

A. Mr. Hall used to come in the shop where I worked, and I possibly did, I imagine I did.

Q. Did you do any other work for Mr. Hall, in 1934?

A. I really think I did do some work for him.

Q. Did you make any guides, any pipe guides for him in 1934?

A. I can't remember making any.

Q. You can't remember what the work was you did in 1934? A. It was general repair work.

(Deposition of Chris Nelson.)

Q. In 1936 did you do any work for [3848-73] Mr. Hall? A. '36? No.

Q. Did you do any work for Mr. Hall in 1937?

A. No.

Q. 1938? A. No, I didn't.

Q. Or at any other time besides 1934 and 1935?

A. No.

Q. You state you were working in 1934 for the California Sales & Service. Do you remember how long you worked for that company?

Mr. Scofield: Did you get the question?

The Witness: Oh, no. I didn't get it.

(The question was read by the reporter.)

Mr. Scofield: Do you understand the question?

The Witness: Yes, I do understand it, but I don't remember how long I worked there.

Q. (By Mr. Lyon): Do you remember when you went there? A. I went there in '33, 1933.

Q. In 1933? A. 1933, as I remember.

Q. You don't remember whether you worked there one, two, three or four years?

A. No, I can't remember the amount of time that I worked there for them.

Q. Do you know whether you were working for California [3848-74] Sales & Service when you state you made this structure, these so-called scratchers?

A. I didn't make any of the scratchers when I was with the California Sales & Service. I didn't make any scratchers there.

(Deposition of Chris Nelson.)

Q. Did you know Mr. Hall in Arizona?

A. No.

Q. You never met him there?

A. No, I haven't.

Q. Was Mr. Hall recommended to you by anyone that you know of in 1934 when he came to see you in Bakersfield?

A. No, he wasn't.

Q. Did you have mutual friends at that time?

A. Did I have mutual friends with——

Q. Mr. Hall?

A. Oh, only just passing acquaintance is all.

Q. Is that true in Arizona, also?

A. I didn't never know him in Arizona.

Q. You never knew anyone he knew in Arizona?

A. Oh, I might have, but I don't know.

Q. You don't know? A. No. [3848-75]

* * *

CLAY MILLER

called as a witness by and on behalf of the plaintiff in rebuttal, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Clay W. Miller.

* * *

Direct Examination

By Mr. Scofield:

Q. Mr. Miller, where do you reside?

A. Artesia. [3988]

(Testimony of Clay Miller.)

Q. What is your business? A. Welding.

Q. What type of welding?

A. Heliarc, bit tipping, specialized work.

Q. Do you have anything to do with the oil industry in connection with your welding business?

A. Yes, sir.

Q. In what respect?

A. Well, retip drilling bits, oil well drilling bits; we do numerous jobs in the shop relative to the oil industry.

Q. Where did you reside in 1933-1934?

A. Bakersfield.

Q. What business were you in at that time?

A. Welding.

Q. What type of welding?

A. Strictly oil field welding.

Q. What business were you engaged in in 1935?

A. I went to work for the Vernon Tool Company August 1, 1935.

Q. What is the business of the Vernon Tool Company?

A. Manufacture and repair of various oil tool equipment.

Q. How long did you continue in the employ of the Vernon Tool Company?

A. Until January, '36. [3989]

Q. And what business did you start at that time?

A. I went to work for Myers Core and Drilling Company.

Q. Do you know Mr. Jesse E. Hall, Sr.?

A. Yes, sir.

(Testimony of Clay Miller.)

Q. How long have you known him?

A. Since 1929.

Q. Did you know him when you were living in Bakersfield?

A. Yes, sir.

Q. Did you know of any oil wells that he was drilling there around Bakersfield?

A. Yes, sir.

Q. Where?

A. The Weed Patch we called it.

Q. Do you know the name of the well that he was drilling in the Weed Patch district?

A. The only thing I ever knew that well by was the Bristol well.

Q. Where was it located with respect to the town of Bakersfield?

A. North of what we called the Four Corners in the Weed Patch, which is where the restaurants and businesses, or whatever it is, was.

Q. Were you ever out on the lease?

A. Numerous times. [3990]

Q. Were you there when he was drilling the well?

A. Yes, sir.

Q. Do you know what a centralizer is?

A. Yes, sir.

Q. Did Mr. Hall ever talk to you about any work he was doing on a centralizer?

A. Yes.

Q. When?

A. In August of 1935.

Q. What did he tell you that he was doing?

A. I went out to the well and he was telling me about having a model made, or had one made,

(Testimony of Clay Miller.)

rather, and he drove me or drove him up to the Hall Machine Works and he showed me the model.

Q. Where was the model in the Hall Machine Works?

A. Well, as you go in the door, I remember, it was on a bench or table or something right inside of the door to the right.

Q. Describe the model as you recollect it.

* * *

The Witness: It was mounted on a pipe and it had two bands, steel bands, with spring steel blades attached from [3991] one band to the other holding them a distance apart of 12, 15, 16 inches—I didn't measure it—and some bristles sticking out of the top of one of the bands, wire bristles, and some lugs welded on the side of these steel blades.

Q. And when you saw this device at the Hall Machine Works did you take it along with you or did you leave it there?

A. No, it was left there.

Q. Did you ever see it on any other occasion?

A. Never.

Q. Have you testified about this model previously in this case? A. In an affidavit.

Q. At the time that you gave testimony with respect to the model did you at that time make a sketch?

A. Make a sketch? I remember I made several sketches.

Q. Did you make a sketch of this particular model? A. I believe so.

(Testimony of Clay Miller.)

Q. I put before you a sketch marked for identification in this case as Plaintiff's Exhibit 50, and ask you if you can identify it?

A. (Examining exhibit): I can.

Q. What are the objects that appear on that sketch?

A. As previously described, two bands, steel blades, the lugs and the wires out the top. [3992]

Q. Did you only see this model of the device which is shown in the sketch on the one occasion?

A. That is all.

Q. Did you ever discuss the matter with Mr. Hall at any other time besides the time that you went to see it at the Hall Machine Works?

A. I did.

Q. First tell us what the discussion was there at the Hall Machine Works with respect to this [3993] model.

* * *

Q. (By Mr. Scofield): Did you have any discussion with Mr. Hall at the time that you went to the Hall Machine Works to see this model?

A. Sure. He described or was telling me about his object and what the thing was supposed to do. Word for word, or either to remember that discussion is past me.

* * *

Q. (By Mr. Scofield): Was anybody else there with you at the Hall Machine Works?

A. No, there wasn't.

Q. And about when was this?

(Testimony of Clay Miller.)

A. In August, 1935. [3994]

Q. Give the conversation as you recall.

A. All I recall of the conversation was the lugs on the blades, which I had never saw or never remembered, why was it. I built lots of centralizers, straight-blade centralizers, and saw those lugs on the outside of the springs, and that was something new to me and I naturally asked what was the purpose; and he said so as that they were on an angle that they hit the side of the well and rotate the centralizers.

Q. Had you yourself made centralizers prior to the time that you saw this model? A. Oh, yes.

Q. And you knew of their use?

A. I have welded them on pipes, just straight blades, steel springs on pipe.

Q. Did Mr. Hall tell you how this particular model was to be used?

* * *

A. Other than the purpose for the lugs in the centralizer. He didn't have to explain——

The Court: Just what was said?

The Witness: That is all I remember of the conversation. [3995]

Q. (By Mr. Scofield): I notice in your sketch that there appears to be some wires sticking out from the upper collar. A. That is correct.

Q. Also what is your recollection as to the structure of that collar?

(Testimony of Clay Miller.)

A. Other than that there was wire bristles sticking out of that collar, I don't remember the construction.

Q. What type of wire bristles were they?

A. They were spring steel.

Q. And how were they fastened to the collar, do you recall?

A. The collar was on a pipe and I couldn't—and the wires went through holes, drilled holes. I couldn't see the back or how they were held in or anything like that.

Q. Do you recall how the wires extended from the collar?

A. The best I can tell, they were just sticking out of the collar, I would say, horizontally angled one way or the other off of horizontal.

Q. This sketch that you made, does that depict the scratcher or a model, as you call it?

A. Yes, sir.

Q. Do you know what a scratcher is?

A. I do now.

Q. Did you know in 1935?

A. No, sir. [3996]

Q. Did you see a scratcher of any sort around Mr. Hall's well in 1935?

* * *

A. Not prior to seeing this model. Later I had, yes.

Q. (By Mr. Scofield): When was that?

A. That was several months later, on the well,

(Testimony of Clay Miller.)

out at the well at the Weed Patch, Bristol No. 1 or whatever a number it was called. There were some bands with some wires sticking out of it. I don't know how many, five, six, or four. I don't know—laying on the pipe, by the pipe rack there. It wasn't a rack; it was mounted up on eight by eights, ten by tens, or twelve by twelves. He just built it up and rolled a pipe on. And at the corner of one of those wooden places these things was laying there. I had never saw anything like it. I picked it up and looked at it, examined, put it up on the well to see. Mr. Hall, he wasn't there, so I left.

Q. Who was at the well at the time?

A. I couldn't remember that.

Q. Did you know any of the other men who were working on the well besides Mr. Hall?

A. Oh, yes. Yes.

Q. Who were they?

A. Well, his brother, Clyde Hall, worked out there; [3997] his son, George, worked out there; his son, John, and Elmer and Junior.

Q. How do you fix the date when you saw these scratchers at the Bristol No. 1 well?

A. Due to the fact that I only worked six months for Vernon Tool, and knowing the date I started and the date I stopped, and it was right after I went to work that I saw the model, and there was quite a lapse of time in there before I saw those things out at the well, as I testified, two or three months. I don't know.

(Testimony of Clay Miller.)

Q. Do you remember what the occasion was for your visit to the well at that time?

A. Well, I was a salesman for Vernon Tool Equipment, doing soliciting work. He was drilling an oil well. He is a friend of mine and I tried to see if I could do some business.

Q. Describe the object in detail, as you recall it, that you picked up at the time that you went out and saw these objects at the well.

A. It was a steel band with a bunch of wires sticking out through drilled holes.

Q. Did you determine at that time how the wires were fastened to the band, as you have called it?

A. I picked it up and examined it.

Q. Did you discuss this object or these objects with Mr. Hall after you had seen them out [3998] there?

A. No, I never did. I never even knew what they was being used for or give it another thought. I thought it was a funny-looking thing and dismissed it from my mind.

Q. At the time that you previously testified in this case did you draw a sketch of how these wires were fastened?

A. I believe so. I drew several sketches.

Q. I show you a sketch which has been marked for identification as Plaintiff's Exhibit 51 and ask you if you can identify it?

A. Yes, sir.

Q. I notice at the top of this sketch there is a notation, "shape of wire." What did you mean by that?

A. The way the wire was bent.

(Testimony of Clay Miller.)

Q. And at the left or just below this notation there is an object which has been drawn which has been designated "wire." Explain the structure of that wire, if you will.

A. It is marked "wire retainer."

Q. I am referring to the one marked A.

A. A, that is the wire bent to approximately that shape or similar to it.

Q. What were you trying to draw when you drew that object which is marked A?

A. Draw the wire so I could designate how it was put together.

Q. And where was this wire when you saw it out there? [3999]

A. It was sticking through these couplings.

Q. Now, you have also drawn something that you have marked B; what is that?

A. Just a round circle which is wire or was a retainer. It was strung through the part here to hold it in the coupling.

Q. And you are referring to the loop in the object which is marked A? A. Yes, sir.

Q. Now, what is the object that you have marked C and designated "coupling"?

A. A cross-section there showing the wires going through and the wire that is strung through that to retain it.

Q. Now, you have marked the lower figure which is marked No. 3 with certain identifying letters, A, B and C? A. That is correct.

Q. Will you state what they are?

(Testimony of Clay Miller.)

A. A is the wire, B is the retaining wire, and C is the coupling.

Q. And did you intend to have the numbers and objects correspond to the same numbers that appear on the objects above? A. Yes, sir.

Q. On how many occasions, or did you at any time after the visit when you first saw these scratchers ever see them again? [4000]

A. Not that I recall. I don't believe so.

Q. Did you ever see that mounted on the pipe?

A. No, sir.

Q. Did you ever weld any of these devices on pipe for Mr. Hall? A. No, sir.

Q. Did you ever do any welding for Mr. Hall?

A. Prior to going to work for Vernon Tool, yes.

Q. Did you see these devices at any time prior or when you were doing this welding?

A. No, sir.

Q. And prior to the time that you went to work for Vernon? A. No, sir.

Q. There has been offered here in evidence a tool, Exhibit 272-A. Does that resemble in any respect the scratchers which you saw on the Bristol lease in 1935?

* * *

A. That is not exactly the way I remembered it.

Q. (By Mr. Scofield): How does it differ; that is, how does 272-A differ from the devices? [4001]

* * *

A. The wire stuck out similar when you picked

(Testimony of Clay Miller.)

up the collar, but, as I remember, the wires were looped and the wire retainer was put in a V-shape of clearance inside the coupling. These seem to be stuck through there and wrapped over or something, to hold, and that was not the case as I remember.

Mr. L. E. Lyon: By "these," you mean in this device in front of you?

The Witness: How is that?

Mr. L. E. Lyon: When you said "these seem to be stuck through, not as I remember them," were you referring to the device in front of you?

Mr. Scofield: 272-A.

The Witness: Yes, the wires sticking out of the coupling, I say. [4002]

* * *

Q. (By Mr. Scofield): What is your recollection as to the fastening of the wires in the scratchers that you saw on the Bristol lease?

The Court: Why call them a "scratcher"? You are just inviting the same objection. Call it a device.

Mr. Scofield: A device.

A. The coupling had a groove cut inside. The wires were bent similar to this drawing and stuck through the various places around.

The Court: Similar to the drawing——

The Witness: This drawing I mean here, yes.

The Court: And that is Exhibit?

Mr. Scofield: 51.

(Testimony of Clay Miller.)

The Court: Very well.

A. And the ring wire went through these loops and these wires, hairpin shaped, was strung out like that, and that would hold them rigid against the drill hole, and the [4003] wires in the back would keep them from being drove out. That is the only thing I can remember about the thing.

Q. (By Mr. Scofield): Is the structure you have explained shown in the sketch, Exhibit 51?

A. Yes.

Q. For identification? A. That is right.

Mr. Scofield: I offer in evidence, your Honor, the sketch, Exhibit 50, to be marked for identification.

The Court: You have referred to it as Exhibit 51.

Mr. Scofield: There are two, your Honor.

The Court: There are two sketches?

Mr. Scofield: Yes, sir.

The Court: Are you offering the Exhibit 51?

Mr. Scofield: Yes, sir; I am offering them both, Exhibits 50 and 51. [4004]

* * *

Cross-Examination

By Mr. L. E. Lyon:

* * *

Q. You state that you knew that Mr. Hall was in the summer of 1935 trying to build a centralizer?

A. No, sir. I said I saw a model that he had built.

(Testimony of Clay Miller.)

Q. And that model had lugs on it which you have shown in a sketch, Exhibit 50, and that is the particular element of that model that you recall, isn't it? A. I distinctly recall the model.

Q. You distinctly recall the lugs, don't you?

A. Yes, sir; I do.

Q. And those lugs you have drawn on Exhibit 50 and noted, "Lug A, lugs on blades," and you have drawn a separate [4005] side view of the blades in Exhibit 50, have you not? A. Yes, sir.

Q. Now, what did you intend to show by that sketch side view? A. What I remembered.

Q. Now, you say you pointed on the side view to blade A, sketch made on cross-exam. That is in your handwriting, is it?

A. That certainly is.

Q. And that black section of the side view, what is that intended to be? A. A lug.

Q. What do you mean by a lug?

A. Have you got a better name for a piece of steel welded on top?

Q. No; I am asking you what you mean by that.

A. A piece of steel.

Q. A piece of steel. All right. Now, what was the size or dimensions of that piece of steel?

A. I didn't measure it. It extended approximately a half inch out.

Q. Extended a half inch out? A. Yes.

Q. How long was it?

A. Those blades were probably about five-eighths of an [4006] inch wide and they were long enough

(Testimony of Clay Miller.)

to go at a 45-degree angle and completely cover the blade.

Q. And that was an idea that Mr. Hall had, did he tell you, for trying to make a centralizer rotate?

A. That is correct.

Q. And that is what you remember about this device that you saw at the Hall Machine Shop in Bakersfield, is that correct? A. Correct.

Q. Now, you are familiar with centralizers, are you not? A. Yes, sir.

Q. You say you made them? A. Yes, sir.

Q. I will place before you a centralizer and I will ask you if you recognize this device as a centralizer? A. I do.

Q. Are you familiar with that particular centralizer?

A. It is what I call a spiral centralizer.

Q. Do you know who makes the spiral centralizer?

A. The Weatherford Oil Tool Company.

Q. Do you recognize this as a Weatherford Oil Tool spiral centralizer?

A. I wouldn't recognize it as one built there. It could have been built by anyone. That particular one, I [4007] don't know.

Q. As far as you see, it is precisely the same as the one built by the Weatherford Oil Tool Company? A. That is right.

Q. Now, did this centralizer—and I am going to place this up here on the blotter—that you made a

(Testimony of Clay Miller.)

sketch of—look like this centralizer which I have placed before you?

A. No; the blades were straight.

Q. There was no—— A. Spiral.

Q. ——spiral to the blades?

A. That is right.

Q. Does it look like it in any other way?

A. Two collars top and bottom, and it has no lugs on it.

Q. And those lugs that you have drawn on this sketch, would you just state where they were on the blades of this centralizer, using this spiral centralizer to indicate it?

A. I will use my finger for the so-called lug (indicating). It was set on an angle like that.

Q. And you have placed your finger at about a 45-degree angle about the midpoint of the blades, and by “midpoint” I mean halfway between the two collars, is that correct?

A. That is correct. [4008]

Mr. L. E. Lyon: I will, for the purpose of illustrating the witness' testimony, offer in evidence the spiral centralizer as a defendants' exhibit next in order. Also I believe that since there has been considerable discussion of a spiral centralizer, perhaps it would be for the edification of the court and an exemplar of such centralizer which I think should be in the record.

The Court: Any objection?

Mr. Seofield: No objection. I should like to have counsel state whose centralizer it is.

(Testimony of Clay Miller.)

Mr. L. E. Lyon: It is the Weatherford Oil Tool centralizer purchased on the open market.

The Court: Very well. Is that agreed?

Mr. Scofield: Yes, sir.

The Court: Received in evidence as Defendants' Exhibit——

The Clerk: HQ. [4009]

* * *

Redirect Examination

By Mr. Scofield:

Q. Did you know Mr. Chris Nelson?

A. Yes, sir.

Q. In Bakersfield? A. Yes, sir. [4011]

Q. Did you ever discuss any of these devices with him? A. No, sir.

Q. To your knowledge, did he ever make any of these devices for Mr. Hall?

A. Not to my knowledge, no.

Q. When you saw the model in the Hall Machine Works did you see anything else there that Mr. Hall was working on besides this model?

A. No; the model was on the bench there, and there were parts laying around there which I didn't pay much attention to. [4012]

* * *

DEPOSITION OF ALFRED M. HOUGHTON
first having been duly sworn by the Notary Public,
was examined and testified as follows:

Direct Examination

By Mr. Scofield:

Q. Please state your name.

A. Alfred M. Houghton.

Q. Are you the same Alfred M. Houghton who gave a deposition in this case in January of this year?

A. Yes—in 1950 it was.

Q. What was the date of that deposition, do you have it before you there?

A. January 9, 1950.

Q. Are you the patent attorney for Gulf Oil?

A. Yes; I am patent counsel for Gulf Oil Corporation.

Q. What do your duties include, Mr. Houghton, insofar as Gulf Oil is concerned?

A. I represent and advise Gulf in all matters having to do with patents, and also I advise them in connection with other matters, such as contracts and the like, acting as counsel for them in very many different matters.

Q. Do you handle any of the Gulf Oil Company's [4139-2] foreign patent applications?

A. I do.

Q. Do you handle all the foreign applications filed for Gulf Oil?

A. I supervise the filing of all of them.

Q. Do you counsel with the executives of Gulf Oil with regard to foreign patent matters?

(Deposition of Alfred M. Houghton.)

A. Yes; I discuss them with them.

Q. Where are the headquarters of the Gulf Oil Company?

A. It is a corporation of the Commonwealth of Pennsylvania, with its office in the Gulf Building, Pittsburgh, Pennsylvania, about Seventh Avenue and Grant Street.

Q. Does the Gulf Oil Company operate in Canada?

A. I do not think so, as Gulf Oil Corporation.

Q. Do you know under what company name they operate in the Dominion of Canada?

A. No; I am not sure of that. I know they have some subsidiaries, and I think those subsidiaries are corporations of the United States which, perhaps, are registered to do business in Canada.

Q. Do you know whether the Gulf has production in Canada? [4139-3]

A. Not to my own knowledge, but I have heard so.

Q. Do you know of a Mr. Bohart?

A. I know of Mr. Bohart, yes.

Q. Do you know where he is located?

A. My impression is that he is either in Tulsa, Oklahoma, or at Houston, Texas; I am not sure at this moment which. I have very little contact with him.

Q. To your knowledge, do you know whether or not he has anything to do with the Gulf Oil Canadian operations?

(Deposition of Alfred M. Houghton.)

A. I would gather, yes, from information which has come to me from time to time.

Q. I put before you, Mr. Houghton, a United States patent, No. 2374317, which is in evidence in this case as Plaintiff's Exhibit 38. You know of that patent, do you not? A. Yes.

Q. How long have you known of the patent?

A. For quite a long time, I imagine, shortly after its issuance.

Q. You have had occasion, then, to familiarize yourself with the disclosure of the patent?

A. Yes.

Q. Do you have any knowledge of a contract between the plaintiff, Jesse E. Hall, and Kenneth A. [4139-4] Wright, which involve that particular patent?

Mr. Lyon: That is objected to as calling for a legal conclusion of the witness.

The Witness: I know of a writing which purports to be a contract between those mentioned which, I think, does involve this patent.

Q. (By Mr. Scofield): Do you have a copy of that contract in your office? A. Yes.

Q. How long have you had that copy?

A. For quite a long while. I would have to look at my records to see when I first became possessed of a copy of it—first came into possession of a copy of it.

Q. Did you have the contract before you gave your deposition in January, 1950?

A. Oh, yes.

(Deposition of Alfred M. Houghton.)

Q. That particular contract is in evidence in this case as Plaintiff's Exhibit 34, and is dated September 15, 1944?

A. Plaintiff's Exhibit what?

A. Thirty-four.

Q. How long after the date of the contract did you have knowledge of it, can you say? [4139-5]

A. What was the date?

Q. September 15, 1944.

Mr. Lyon: I do not believe that this witness is qualified to answer as to what instruments are or are not in evidence in this case, and if this is an attempt to get this witness to affirm what is or is not in evidence, I think it is entirely improper.

Mr. Scofield: Well, there is no such attempt, of course. The question does not so indicate.

The Witness: Around about April of 1947, in connection with an investigation I was making of patent rights of Kenneth A. Wright or the B & W Company, I had an assignment search made in the United States Patent Office, and there was located this contract which was there recorded, and I sent a stenographer over to the United States Patent Office and made a copy in order that I may have it in event that I should have to consider it in connection with the investigation.

Q. (By Mr. Scofield): Did you also at that time have a copy of the Wright patent, 2374317, which you have before you?

A. I think so, yes. That was one of the patents I was investigating.

Q. I put before you a Canadian patent, No.

(Deposition of Alfred M. Houghton.)

way as the patent marked for identification Exhibit Q2. It was published in the Canadian Gazette as a reissue, and we ordered copies and studied it.

Q. Did you make any investigation of this Wright reissue patent after it came to your attention?

A. Yes. In the normal course of work, being interested in this situation, we compared it with the Canadian patent 463822 to determine the difference in the claims over that patent. [4139-9]

* * *

Q. I shall try to fulfill your expectations.

On the receipt of this letter from Mr. Wright, what did you do next? Did you make further investigation of this reissue patent?

A. I do not think so; I had already considered the patent. I note that in my receipt date stamp, which is April 9, 1951, on this letter, there is in the space "Refd to," there is a notation "JHL," so that it was referred to Mr. James H. Littlehales, for whom these initials stand, for his consideration. The claims being the same as those I had [4139-14] already considered, I do not think we did anything further about it. [4139-15]

* * *

Q. Did you see anybody from the firm of Lyon and Lyon during June, 1951?

A. I think so. I am not sure; I will have to check up on that.

Q. Do you have a record of that there?

(Deposition of Alfred M. Houghton.)

A. On June 19, I had a letter from Lyon and Lyon, [4139-27] stating:

“When I was last in Washington I stated that I would advise you with respect to the Hall vs. Wright case set for today, June 19. The case was called today by the Court.”

I do not know what else this has to do with him—oh, yes. He says:

“I enclose a decision of the Commissioner of Patents in the Hall vs. Wright interference directing the primary examiner to finally reject the pending Hall application, Serial No. 55619, thereby concluding that no patent should be granted to Hall upon his application.”

Q. Is that a letter from Mr. Leonard Lyon to you?

Mr. Lyon: No; it is a letter from Mr. Lewis Lyon.

The Witness: No; it is not.

Q. (By Mr. Scofield): That is a letter from Mr. Lewis Lyon to you, Mr. Houghton?

A. Yes.

Q. Now, had you seen Mr. Lewis Lyon or Mr. Leonard Lyon during the month of June, [4139-28] 1951?

* * *

Q. What was the other matter that was under consideration, Mr. Houghton?

A. It was a matter between Mr. Lyon and myself, as to offering when he sold us scratchers, if we purchased them, to let the purchase price in-

(Deposition of Alfred M. Houghton.)

clude a royalty, which would give us a license immunity under all patents which might cover the use of it.

Mr. Scofield: I think the letter is pertinent, and I should like to have it marked, if you will, please. That is Exhibit 83.

The Witness: I objected to the procedure because there might be an implied admission of validity of the patent that we might take a royalty under. I later secured from Mr. Lyon a statement that that would not be so, and he would not hold us to that, and I think I approved the [4139-42] purchase of the scratchers under those conditions. It was all an entirely different matter from any Canadian patents or anything of that [4139-43] sort.

* * *

Q. Was the Venezuelan litigation discussed at all in this conference had in Pittsburgh on August 20, 1951?

A. No; only in a most general way in the sense that the parties were litigating in the United States, and we thought there was some litigation going on in Canada. I think you had advised me that you were going to file some petition, or had filed some petition, to cancel the Canadian Wright patent, and in a general way [4139-44] it was merely said that was the trouble here; all this litigation between the parties, the controversy, is of their own making, and that we cannot keep on being involved in this all the time, so let us make some decision as to

(Deposition of Alfred M. Houghton.)

what we should do, and it was decided that since Gulf always respected the patents of others, that having been our policy for years, we would take this situation as it existed from the patent standpoint, and since Wright had a patent in Canada covering the operations we would conduct until we had reason to know that that patent did not cover those operations or was invalid, we would respect it; and therefore we thought we should advise what we called the field to buy only B & W scratchers in Canada, and thus respect that patent, until conditions changed or we wished to advise otherwise.

As regards the United States, we decided there was a controversy going on. The parties seemed to think that I, as patent counsel, should interpret the old contract between Wright and Hall, make a decision as to what will ultimately happen in this litigation; and I have taken the stand constantly that since there is this litigation the court should decide such matters, and the very fact that there is a litigation shows that there is doubt, at least as to the patent situation [4139-45] in the United States. [4139-46]

* * *

Q. Was there ever any discussion of any kind had at any time between you or Mr. Littlehales, Mr. Wright, Kenneth A. Wright, or myself, or any other representative of Lyon & Lyon with respect to the Canadian reissue patent No. 463822?

Mr. Scofield: That is the parent.

Mr. Lyon: That is the reissue.

(Deposition of Alfred M. Houghton.)

Mr. Scofield: That is the parent.

Q. (By Mr. Lyon): No; change that number to 472221.

A. I don't recall now. If you know of it and could refresh my recollection I would be very pleased.

Q. Is it not a fact——

Mr. Scofield: Let him finish the [4139-82] answer.

The Witness: I don't think there was any detailed discussion of the reissue patent between us; I don't recall it.

Q. (By Mr. Lyon): Is it not a fact, Mr. Houghton, that on July 23, 1951, at the time that Mr. Wright and I were in your office, that a conversation took place substantially as follows, where you asked me, "How did you obtain so much better claims in Canada than you did in the United States," and that I replied, "We had nothing to do with obtaining the claims in the United States and were not bound to repeat the same mistakes that were made here in Canada"?

A. I remember something about that, Mr. Lyon, but as to the date of that talk, I don't know; I do remember that——

Q. Do you remember any other discussion had with respect to the Canadian patent, the Canadian reissue patent, with myself or Mr. Wright or anything else that was said?

Mr. Scofield: Of course, I object to counsel's statement as to what occurred as merely being self-

(Deposition of Alfred M. Houghton.)

glorification, as to the results in Canada, but otherwise I will let it go without too much comment.

The Witness: Mr. Lyon, I don't recall those matters in detail.

Q. (By Mr. Lyon): Well, you do not recall——

A. I can refresh my recollection sometimes by little [4139-83] things that are said, little suggestions, but I am sure if it had been any definite statements that I thought were germane to this involved situation I would have made a memorandum of it at the time, and I don't have any such memorandum of that kind of the talk.

Q. Well, you remember no other conversation?

A. I don't remember it; no, sir; I am sorry. If there was one, I don't remember it.

Q. All right. I do not know of any other.

A. Well, I am glad to be affirmed by such able counsel. [4139-84]

* * *

Q. On July 23rd you also informed me, after I had assured you that the Gulf Company's purchasing of B & W scratchers on the invoice in question would not be construed as an admission by you or the Gulf Company of the validity of the Wright patents, that you would accept that method of invoicing?

A. I hardly ever make that kind of a definite statement until I have had a chance to consider it. I think probably what I said was that I would be inclined to advise that it be accepted. [4139-85]

* * *

(Deposition of Alfred M. Houghton.)

Q. Mr. Houghton, you have requested of me from time to time, and also of Mr. Wright and Mr. Coy of our office, that we at all times keep you fully advised as to anything that might occur in this, we will call it, scratcher situation which might be of interest to you, have you not?

A. In the early stages I think that was the understanding. [4139-86] Whether or not I requested it definitely, and I did the same thing with Mr. Scofield—but lately I have told both of you or one of you that I don't request that information any more.

Q. You do not want any more information?

A. I do want it, but I don't request it. If you gentlemen wish to send it to me of your own accord, I will appreciate it, but I don't request it because I don't want any inference to be drawn here that I am taking sides in this [4139-87] controversy.

* * *

The Court: What does the plaintiff claim is the closest prior to this claimed invention of Wright?

Mr. Scofield: The method or the apparatus, your Honor?

The Court: Both, or each.

Mr. Scofield: It is according to what method you are referring to. If it is the method that they have represented to the trade that the patent covers—

The Court: I am referring to the method described in the patent.

Mr. Scofield: As far as the method described in

the [4158] patent is concerned, your Honor, I do not believe there is any very good art.

The Court: How about the device?

Mr. Scofield: The device, your Honor, I think is pretty well anticipated by the Shaw patent in connection with the patent to Black and [4159] Stroebel.

* * *

The Court: You claim that the Black and Stroebel—first the Shaw patent and then the Black and Stroebel patent, is that correct?

Mr. Scofield: Yes. [4160]

* * *

Mr. L. E. Lyon: My motion is under Rule 13(e) and 13(d), and it is a motion to file a supplemental counterclaim for declaratory judgment growing out of the fact that there has issued on Exhibit 69 here in evidence, the patent to Jesse E. Hall on March 9, 1954, which is United States [4165] Letters Patent No. 2,671,515, which is germane to these issues and, in fact, is one of the matters within this issue, and is a matter growing out of the same transactions, in fact, in my opinion it would be a compulsory counterclaim had the matter been matured at the time of the filing of the pleadings in this matter, and certainly all of the evidence with respect to that patent, a great deal of that evidence is already in evidence here, and the three claims which the patent issued have already been testified to on the stand by Mr. Doble and a comparison made of those claims with the prior art.

It is my request that the supplemental pleading

be filed as soon as I can prepare it. It will be prepared today, if possible. I learned of the issue of this patent at 9:30 this morning.

And if there is any answer required or permitted under Rule 13(d), I would request that this matter proceed to immediate trial, if any further trial is required, either tomorrow or at the court's first opportunity which, if not during this week, might be during the first or second week of April. [4166]

Mr. Scofield: Of course, your Honor, we know of the issuance of the Hall patent, and this Hall patent, as you probably know, was issued on the three claims that were allowed, the 23, 24 and 31, which were mentioned yesterday in my argument; that is, these claims were in the Exhibit 69 application which is the 55,619.

We have chosen to prosecute this particular patent in another jurisdiction not because we would not like to try it here but because it is more convenient for us to try it elsewhere.

Mr. L. E. Lyon: That is just, your Honor, what I object to, a multiplicity of suits to determine a matter which can be equally determined in this court, with the evidence mostly before this court at the present time; and also the fact that there will be undue publicity given to this matter which is already before the court at the present time.

The Court: • If we include this one, is there any chance of ever getting a decision in this case, or will some other hydra-headed issue be raised?

Mr. L. E. Lyon: There is no other issue that I know of this character that could arise.

Mr. Scofield: We have already chosen our jurisdiction, your Honor, and the suit has been filed.

The Court: Where is the suit? [4167]

Mr. Scofield: It is pending in the State of Kansas against J. L. Robinson. It was filed yesterday or Monday.

Mr. L. E. Lyon: You see, your Honor, that is filed against a customer or distributor rather than being filed direct. And we would also ask this court, under the authority of a similar proposition, that the trial of that case be enjoined pending the outcome of this case where the same issues are now before the court.

The Court: Your motion is to file a supplemental complaint, a supplemental counterclaim?

Mr. L. E. Lyon: Yes, your Honor, for declaratory judgment with respect to this patent.

The Court: A supplemental answer setting forth a counterclaim for declaratory judgment declaring what?

Mr. L. E. Lyon: With respect to this patent, to have the patent declared invalid and not infringed.

Mr. Scofield: Those issues, of course, your Honor, are not before this court.

Mr. L. E. Lyon: The issue of these claims is certainly before this court and they have been testified to extensively; in fact, you argued them yesterday yourself.

Mr. Scofield: No, I did not. I did not argue them yesterday.

Mr. L. E. Lyon: Further, there has been notice

given to the trade that our customers will be sued under this [4168] patent as soon as it issues.

The Court: I do not suppose there is any question that there is a controversy between you as to the validity of those claims, is there?

Mr. Scofield: I think that is true.

The Court: Is there any question about it?

Mr. Scofield: No question about that.

The Court: I will permit the counterclaim to be filed.

You gentlemen brought all of this here. You were welcome to take it anywhere else. You brought it all here, and I am going to button it up and decide it as soon as it is possible to do it.

Mr. L. E. Lyon: Thank you, sir.

The Court: You may file a counterclaim.

Mr. L. E. Lyon: I would ask the court to set this additional matter, if any further evidence is required, for the first week in April.

The Court: Will there be any further evidence?

Mr. Scofield: What is the effect, your Honor, of the suit that is already filed in Kansas?

The Court: It is still pending. It is not between these parties.

Mr. Scofield: These parties will intervene; there is no question about that.

The Court: They are not named. [4169]

Mr. Scofield: No. J. L. Robinson is named.

The Court: It is a suit against someone else.

Mr. L. E. Lyon: In this case—well, I will present the motion later when I learn what the case is. If there is any publicity given to it, I will consider

it a violation of the injunction of this court, matters arising out of this controversy, being a distributor, which injunction now stands.

The Court: I would not wish this controversy off on the District Court of the District of Kansas at this stage. In 1947, yes, or '8.

Mr. L. E. Lyon: Any place else.

Your Honor, what will your Honor's ruling be with respect to the presentation of additional evidence?

The Court: Is there any more evidence to be presented?

Mr. L. E. Lyon: We will present evidence probably in the way of a distinction between the claims, with certain correspondence or certain presentations with respect to the claims and allegations concerning their limitations. That will be very short. It could be taken care of in an hour.

The Court: What kind of evidence? Do you mean an expert?

Mr. L. E. Lyon: Yes, your Honor.

The Court: Isn't that just a matter of argument?

Mr. L. E. Lyon: It may be just a matter of argument. [4170] I don't know whether the plaintiff would desire to offer any evidence or not.

Mr. Scofield: That I will have to give some consideration to, your Honor.

Mr. L. E. Lyon: The question of filing a response to such supplemental proceeding is governed by Rule 15(d), and also the question of the presentation of further evidence; and that is why I was

asking your Honor at this time to determine those matters.

Mr. Scofield: Well, your Honor, I can't take this up in April. It will have to be delayed until after April.

Mr. L. E. Lyon: Take it up this week.

The Court: I cannot envision any additional evidence that would be offered by either side.

Mr. L. E. Lyon: Well, I can't, either.

The Court: I cannot think of any. If you gentlemen have that much ingenuity, you may think of another witness to call upon the subject.

Mr. L. E. Lyon: I have no other evidence, other than that which I have indicated and which is as your Honor has indicated, probably better a matter of argument, that I would offer on the matter.

As far as the plaintiff is concerned, of course, I can't tell what their ideas are.

The Court: When will you have your supplement? [4171]

Mr. L. E. Lyon: I will go back to the office and dictate it right now if this matter is adjourned for that purpose, or I can proceed and dictate it this evening.

It might be better, before this matter is concluded, to have the entire pleadings settled and the argument, before any further argument, so that the matter of any additional evidence can be determined and the matter concluded in one orderly fashion if possible.

I was suggesting the first two weeks in April, your Honor, because I have a case in San Francisco

starting the 19th and I have a very bad confusion in that week already. I am also required to be in the Supreme Court in Mexico on the 19th of April. I don't know how I am going to get to both places now.

The Court: Mr. Scofield says that he cannot take it up next April. Let us submit it now, gentlemen. We will hold a session tonight, if necessary; take a recess now.

Can you settle these pleadings by 2:00 o'clock this afternoon?

Mr. L. E. Lyon: I think I can, your Honor.

The Court: Can you serve Mr. Scofield by 12:00 o'clock?

Mr. L. E. Lyon: I can serve Mr. Scofield by 12:00 o'clock.

The Court: You could have an answer by 2:00 o'clock, couldn't you, Mr. Scofield? [4172]

Mr. Scofield: I don't know what it will be, your Honor.

The Court: Let us make an effort, gentlemen. This litigation is going to join the Jarndyce case if we do not.

Mr. Scofield: Your Honor, I would think it would be more orderly here to have us complete this argument on the issues we have now before us, and then let him prepare his pleading and let the answer come along and immediately proceed to the matter. That is, to interrupt this now, it seems to me, is——

The Court: Any issues as to those claims are here now.

Mr. Scofield: No; it is a separate proceeding.

Mr. L. E. Lyon: No; it is not.

Mr. Scofield: It is a separate patent. It is a separate——

The Court: The application has been here litigated, in effect.

Mr. L. E. Lyon: That is right.

The Court: The only difference is that now it is in the form of Letters Patent.

Mr. Scofield: This case, your Honor, has been whittled down——

The Court: There is no difference in substance.

Mr. Scofield: ——has been whittled down to the unfair competition that we are charging against them and that they are charging against us, and infringement of the Wright [4173] patent, up to now.

The Court: I want to adjudicate the Hall patents, too. I have heard enough about them. And I am not going to wish it off on any other judge if I can help it.

I will expect you to be at issue at 2:00 o'clock, gentlemen, if it is humanly possible for you to do so. You can do it soon, Mr. Scofield? [4174]

* * *

Mr. L. E. Lyon: At this time I will file with the clerk the supplemental answer and counterclaim which have been prepared and served as directed this morning, and ask that the same be filed.

The Court: Any objection to the form of it, Mr. Scofield?

Mr. Scofield: No objection, your Honor.

We have prepared a reply and it is now being typed and will be over just as soon as it is finished.

In that regard, however, I notice that they have in their counterclaim for declaratory judgment of the Hall patent, that they deny infringement. Now it seems to me that we had better have here an understanding as to that matter because otherwise we will have to file a positive pleading, that is, an amended complaint of our own, an amendment to our second amended complaint.

The Court: Well, you are alleging in your answer that they are infringing, I take it?

Mr. Scofield: No, we are just denying, that is, we are denying the allegations and we would have no positive pleading, but we will want a positive pleading unless they will stipulate to that effect. And we want also a stipulation, [4175] certainly, that if the patent to Hall is adjudicated valid and infringed that your judgment will be enforceable without a separate pleading.

Mr. L. E. Lyon: We certainly are making no stipulations. We set forth the fact that there is no infringement on very good ground of the three claims of that patent with the interpretation of the claims that have been set forth by Mr. Scofield.

The Court: Apparently the supplemental answer and counterclaim just filed alleges that the defendants have not infringed said letters patent or any claim thereof.

Mr. Scofield: That is right.

The Court: I take it that that refers to the Hall letters patent No. 2,671,515 issued March 9, 1954.

Mr. Scofield: That is correct.

Mr. L. E. Lyon: That is correct.

The Court: Do you deny that?

Mr. Scofield: Certainly. And we are going to file with your permission a pleading to the effect that they do infringe.

The Court: Why would you need to do that? I do not quite follow that. The prayer seeks a judgment, a declaratory judgment that the defendants have not infringed any of the patent or any claim thereof.

Mr. Scofield: But we have no assurance, your Honor, [4176] that they might not dismiss this as they had dismissed some of these pleadings in the past. Then here we are without a positive pleading in this case as to infringement of the Hall patent and it won't be disposed of in this case.

You have indicated that you are anxious here to have this Hall patent adjudicated. I am anxious, too, and I am desirous of having the whole thing disposed of here, but I don't want any delay occasioned by some quirk or technicality on pleadings.

The Court: You wish to file a supplemental complaint?

Mr. Scofield: I would like to file an amendment.

The Court: Charging infringement?

Mr. Scofield: Yes, sir.

The Court: An amended and supplemental complaint charging infringement?

Mr. Scofield: That is right.

The Court: It will be only supplemental.

Mr. Scofield: That is all, just supplemental or an amended complaint to our second amended complaint.

The Court: Any objection?

Mr. L. E. Lyon: No objection, your Honor, if it may be deemed that this is an answer to that. I don't see any reason for stringing out this pleading.

The Court: Would it be stipulated that the supplemental answer and counterclaim just filed is an answer to your proposed [4177] supplemental complaint charging infringement of this new patent?

Mr. Scofield: That I hope will be stipulated to.

The Court: In other words, that would, I take it, be normally the course of events?

Mr. Scofield: That is right.

The Court: That is, that the plaintiff Hall would charge infringement of this new patent?

Mr. Scofield: That is correct.

The Court: And the defendant might file his answer denying it and counterclaim it?

Mr. Scofield: That is right, or he can stipulate that this will be an answer if he chooses, and that stipulation I would accept.

The Court: Very well. Can you serve and file by tomorrow morning a supplemental complaint charging infringement by the defendants of this new patent, and then it is stipulated, I understand, that the supplemental answer and counterclaim this day filed may stand as the answer to that supplemental complaint charging infringement.

Mr. Scofield: That, your Honor, is being prepared at the present time, that complaint.

Mr. L. E. Lyon: So stipulated, unless there is something alleged in that complaint that we do not foresee at the present time. [4178]

The Court: Yes. It is only permissive that you may permit this answer to stand.

Mr. L. E. Lyon: Yes.

The Court: Very well, gentlemen. I appreciate the difficulty anticipating all of these things on such short notice.

Mr. L. E. Lyon: At this time I would like to be notified as to any other suit that has been filed pursuant to the order of this court that the court was to be kept advised of all litigation pending between the parties and which order was not followed in the filing of this new action, and I understand it was filed in Kansas, and I would like to be notified as to any other suit that has been filed.

The Court: Did you have anything to do with the filing of this Kansas suit?

Mr. Scofield: Yes, sir.

The Court: Are you familiar with the rules of this court that requires attorneys in every case to keep the court advised of any litigation pending in any other court?

Mr. Scofield: Yes, sir. I intended to.

The Court: When was the action filed?

Mr. Scofield: Monday. I just got the word this morning but it has not been served as yet.

Mr. L. E. Lyon: Your Honor, I would also like to have this court to enjoin the prosecution of these

plaintiffs from prosecuting that action pending the outcome of this action, [4179] as it involves the same issues and all of the issues are before this court and it makes for needless multiplication of expense. The only reason for filing it was to prolong this litigation. It could have been brought in here in the same way that I brought it in this morning when I learned of it, but they didn't desire to do that.

Mr. Scofield: That wasn't the purpose.

The Court: Do not prolong this litigation. I suggest that since you are a party to that action——

Mr. L. E. Lyon: We are not a party to that action. They sued one of our customers and not B & W. I have been in touch with the clerk in Kansas City.

The Court: That is correct. I am sorry. I was in error in making that statement.

Has there been service? [4180]

Mr. L. E. Lyon: There has been no service, according to the clerk in Kansas City, and I called this noon. There has been no service made. There has been a direction that service be made, however, and the complaint and summons for service has been sent to Topeka, Kansas, according to the clerk, for service, the defendant in the case residing in Big Bend.

Mr. Scofield: Great Bend.

Mr. L. E. Lyon: Great Bend, Kansas.

Mr. Scofield: The reason, your Honor, that you had not been notified, I was awaiting the news that it was served. It has not been served as yet.

Mr. L. E. Lyon: I don't know any reason for waiting for the news it was served.

Mr. Scofield: I didn't know whether we could get the service.

Mr. R. F. Lyon: You did not get an answer to the question whether there were more suits?

Mr. Scofield: There have been no more suits.

The Court: Of course, the spirit of that rule would require that you ask permission of this court. That is one of the difficulties in this case throughout—a controversy submitted to this court and then in turn submitted to a number of other courts, or branches of the controversy.

Mr. Scofield: I did not understand the rule, your [4181] Honor—I may be wrong—I did not understand the rule to be that we had to get permission of the court; that is, this is an entirely different issue there in Kansas. This is on another patent.

The Court: I understand. That is one of the vices with a great deal of this type of litigation, that it engages the attention of too many courts, in my view. It is enough to engage the attention of one court in connection with the matter. There may be other causes of action. You may have a thousand causes of action that you could bring, but this court of equity does not have to listen to you if you are going to go around over the country engaging the attention of other courts.

Mr. Scofield: We were very anxious to expedite it, and what Mr. Lyon says here is entirely in error as to our purpose for filing the Kansas suit.

Our purpose for filing the Kansas suit was to expedite it and not delay. That is what we wanted to do, is to have our patent adjudicated, and adjudicated as soon as possible. And as soon as your Honor indicated that you would take it into this case and would do so immediately, why, I was certainly very glad to have you join it here.

The Court: Is there any occasion for this court to enjoin the further prosecution of that action?

Mr. Scofield: I do not see any reason [4182] for it.

The Court: Or will you withhold any further prosecution?

Mr. Scofield: I won't prosecute that case if you go ahead here immediately and adjudicate it here.

The Court: We are moving as rapidly as we can.

Mr. Scofield: That is what I say, I will not prosecute it there.

There is one other thing, your Honor——

Mr. L. E. Lyon: Are you going to withhold service, or are we going to have to go in front of that court and make a motion?

Mr. Scofield: I think the service ought to be made. I don't see any reason why——

The Court: Then that starts the machinery going and causes the defendants to assert a defense.

Mr. Scofield: I don't see any reason for it not being asserted there; that is, we will withhold prosecution in that case.

The Court: You will have to employ a lawyer, I suppose, Mr. Lyon?

Mr. L. E. Lyon: Certainly, that is what I am telling you.

Mr. Scofield: I don't think that is an imposition. What we have been doing in this case, your Honor, we have been subjected to much worse things than that, so far as these defendants are [4183] concerned.

Mr. L. E. Lyon: I don't know what it is.

Mr. Scofield: There is one other matter.

The Court: Perhaps I had better issue an injunction if we cannot do it any other way.

Mr. Scofield: I would like to know, your Honor, if we are going to dispose of this matter at the present time; that is, there will be no delay in the adjudication of this patent?

The Court: It may take me six months to decide it. I won't promise you——

Mr. Scofield: No; I did not mean that. I mean the actual trial of the action on the patent.

The Court: I don't know why there would be any delay. Is there any evidence to be offered except the Letters themselves?

Mr. Scofield: Well, there is this question of infringement.

The Court: Can't you gentlemen stipulate as to what devices are being sold?

Mr. L. E. Lyon: The devices that are being sold are before the court at the present time, your Honor, as physical exhibits, all of them.

The Court: Do you have a copy of the Letters?

Mr. Scofield: A copy of the Letters Patent, you mean?

The Court: Yes. [4184]

Mr. Scofield: Yes, sir.

The Court: Do you wish to offer them in evidence?

Will it be stipulated what devices are being sold now by the defendants which are alleged to be infringed?

Is there any further evidence to be offered?

Mr. Scofield: Will you need any more evidence with respect to this matter of infringement? Do you want us to apply these claims to this as Mr. Doble did the claims of the Wright patents to our structure?

The Court: It is a matter of argument, I take it. You may proceed as you like. If you put an expert on the stand, I would just treat him as speaking as a lawyer.

Mr. Scofield: Well, if you will permit me to make the argument in applying the claims to the structure, I will dispense with that evidence. But in view of the fact, your Honor, that they have denied infringement here, I must certainly make that proof that they do infringe. And if you will permit me to argue it and show you the structure and apply the claims to the structure, why, that will be sufficient.

The Court: What devices that are in evidence here, or what devices that the defendant is selling, are alleged to infringe the new Hall patent?

Mr. Scofield: The Multiflex and the Nu-Coil.

The Court: What exhibits? [4185]

Mr. L. E. Lyon: Your Honor, I am engaged at the present time in getting out the exhibits which are exemplars of what we are manufacturing and selling at the present time, so I can make a statement in that regard to the court.

The Court: I anticipated you were. I merely asked Mr. Scofield what the plaintiff contended.

Mr. Scofield: I am looking up the numbers of the exhibits, your Honor.

Mr. L. E. Lyon: Here they are, your Honor, the exhibits of structures which defendant is manufacturing and selling at the present time——

Mr. Scofield: 57 and 72, I believe.

Mr. L. E. Lyon: ——are Exhibits 104, the wall cleaning guide——

Mr. Scofield: No, we do not contend that infringes.

Mr. L. E. Lyon: ——Exhibit 72, the Nu-Coil scratcher, and Exhibit 57, which is the Multiflex scratcher. Now, those we are willing to stipulate are the structures which we are manufacturing, selling, and offering for sale at the present time.

The Court: Throughout the United States and in foreign countries?

Mr. L. E. Lyon: Throughout the United States and countries foreign to the United States.

The Court: Very well. Do you so [4186] stipulate? •

Mr. Scofield: Yes, sir.

The Court: Do you wish to offer a copy of the Hall Letters Patent in evidence?

Mr. Scofield: Yes, sir, if I have it.

The Court: No. 2,671,515, issued March 9, 1954.
Do you have a copy?

Mr. Scofield: Yes, sir. I will offer a copy of the Hall Patent 2,671,515 as Plaintiff's Exhibit 286.

The Clerk: 286.

Mr. L. E. Lyon: Have you a copy of that that I might have?

Mr. Scofield: I will get you a photostat. I have two of them. I will give you a photostat of this one.

The Court: Is it stipulated that the document now offered is genuine and in all respects what it purports to be?

Mr. L. E. Lyon: Stipulated it is a true copy of the patent granted by the United States, by the Commissioner of Patents on March 9, 1954. As far as stipulating that it is genuine, I do not question the matter that it is a copy. However, the word "genuine" I shy away from.

The Court: It might import validity, might it?

Mr. L. E. Lyon: That is right.

The Court: Very well. I did not use it in that sense.

Mr. Scofield: I believe you are willing to stipulate [4187] you saw a copy of the patent.

Mr. L. E. Lyon: You furnished a copy.

The Court: Very well, it is received in evidence as plaintiff's exhibit next in order, Mr. Clerk.

The Clerk: 286, your Honor.

The Court: 286.

(The document referred to, marked Plaintiff's Exhibit No. 286, was received in evidence.)

The Court: Plaintiff makes the contention that Exhibit 57, the Multiflex scratcher, and Exhibit 72, the Nu-Coil scratcher, now in evidence, infringe the new patent, Exhibit 286.

Mr. L. E. Lyon: All the claims of it?

Mr. Scofield: That is correct.

The Court: All three claims of it?

Mr. Scofield: Yes, sir.

The Court: And the defendant, of course, denies it.

Mr. L. E. Lyon: That is correct.

The Court: Now, is there any further evidence to be offered either on that controversy as alleged in the counterclaim or the claim for infringement alleged in the supplemental complaint to be filed?

Mr. Scofield: As far as the plaintiff is concerned there is no more. [4188]

* * *

Mr. L. E. Lyon: So that there may be no misunderstanding and no ambiguity in this matter, paragraph numbered 4 of the supplemental answer and counterclaim filed this day, March 17, 1954, I wish to make it known that the "and others" referred to in paragraph 4(e) refers—and I shouldn't have put in "and others"—but it refers to the Union Oil Company and to Thomas Kelly and Sons.

And if that may be understood, I make that statement to avoid any ambiguity.

The Court: That is paragraph 4?

Mr. L. E. Lyon: (e), on page 4, where it says "and others."

Mr. Scofield: That is (e) under (f), Mr. Lyon.

Mr. L. E. Lyon: It is on page 4. It is (e) under (f).

The Court: It is "e" in parentheses under small "f" in parentheses.

Mr. Scofield: Yes, your Honor.

Mr. L. E. Lyon: It says "and others" on page 4. That refers to the Union Oil Company, Rosecrans operations, Wells 38 and 39, and the other Union Oil Company uses of the wall cleaning guide, as well as the Thomas Kelly & Sons operations on December 31, 1939.

Mr. Scofield: There are a couple of questions, Mr. Lyon, that I would like to ask you. You have got, I believe, "Nevada" spelled wrong on page 2, line 7, at the end. [4190] Is that meant to be "Nevada"?

Mr. L. E. Lyon: What line?

Mr. Scofield: Line 7 of page 2.

Mr. L. E. Lyon: Yes. My secretary got her letters mixed.

The Court: Do you intend to seek a declaratory judgment that the defendants have not infringed the patent?

Mr. L. E. Lyon: Yes, your Honor, both that the patent is invalid and not infringed depending on the alleged interpretation of the claims that Mr. Scofield may argue for.

The Court: The non-infringement is not one of the controversies?

Mr. L. E. Lyon: I will tell you what that is if

I may have a copy of the letters patent and the claims.

And that comes from the use in the claims, which has already been held immaterial and of no moment—I mean by the Patent Office—because it has no operative reason, and that is, the claims say, referring to Exhibit 286, the sixth column and the seventh column. For example Claim 1——

Mr. Scofield: Page what?

Mr. L. E. Lyon: Column six. These new patents are not numbered by pages but by columns. It is column six. It defines the point of projection as at the point of the periphery in each of the claims. In Claim 1 the wording is: “having sidewise direction with respect to the radius of the support [4191] drawn to said projection point of the particular whisker,” that being the words used in that claim.

In Claim 2 I believe the same import is found, although I have not even read a copy of this patent until it was just handed to me so that—yes. In Claim 2, in lines 55, 56 and 57 of column 6 of Exhibit 286 the same statement is set forth.

In Claim 3 the statement is set forth in column 7, lines 4 and 5, where it says: “and each projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the radius drawn to said projection point,” and tying it down to the projection being at the point of the periphery.

That is the point of controversy if any with respect to the matter of infringement.

The Court: Do you have any extra copies of this patent?

Mr. Scofield: No, but I will have it photostated, your Honor.

Mr. L. E. Lyon: I have telephoned today to Washington to send some more out. I expect that they will be here in the morning.

Mr. Scofield: There is one other thing I would like to ask about paragraph 3 of the supplemental answer and counterclaim that has just been filed. That is, I notice that both plaintiff and defendant are singular as used in that paragraph. [4192]

Mr. L. E. Lyon: Which paragraph?

Mr. Scofield: Paragraph 3.

Mr. L. E. Lyon: Well, in that respect, as far as the evidence before this court is concerned, I believe there is one defendant but there are plural plaintiffs. B and W, although this is entitled Kenneth A. Wright, et al., there is no evidence that has been presented to this court of any personal liability of Mr. Wright and it is my intention to move to dismiss as far as Mr. Wright is concerned.

As far as Jesse E. Hall, Sr., is concerned, he is the patent owner and there are a multiple plaintiffs in this action and it should be "plaintiffs" and "defendant."

Mr. Scofield: No, there is no controversy, your Honor, between any of these defendants here.

Mr. L. E. Lyon: That is a matter of answer.

Mr. Scofield: With respect to the Hall patent and if you are going to make it singular as to B and W then I only want it against Mr. Hall. That

is there is no controversy here between any of these companies with respect to this patent.

Mr. L. E. Lyon: All of these companies are shown by the pleadings as asserting to be operating under a license from Mr. Hall and they are still in there for the same reason that caused the adjournment of this action in 1952, to bring all parties which had any claim before the court. [4193]

Mr. Scofield: There is no controversy, however, with reference to this patent, your Honor, and it is solely between the plaintiffs here, that is, the plaintiff Hall and the defendants Wright and B and W.

The Court: Are the other plaintiffs licensed under this patent?

Mr. Scofield: No, sir, they are not licensed under the patent.

Mr. L. E. Lyon: The agreements are before the court.

Mr. Scofield: They are before the court but there is no license under this patent as yet.

Mr. L. E. Lyon: They are licensed under the applications and any patent that may be granted. The agreements have been before the court.

Mr. Scofield: Look them over.

Mr. L. E. Lyon: Any rights that the plaintiff Hall might acquire—all right. Let's look them over. What are the exhibits?

The Court: As far as the allegations are concerned, of course the supplemental answer and counterclaim is filed by defendants B and W, Inc., and Kenneth A. Wright.

Mr. L. E. Lyon: Et al.

The Court: No, I am referring to the introductory clause, "Comes now defendants B and W and Kenneth A. Wright."

Mr. L. E. Lyon: That is because Mr. Wright is named as [4194] a party in the action at the present time. However, Mr. Wright should probably be deleted from that. He is only as a party to the litigation already joined in this supplemental answer.

Mr. Scofield: Your Honor, here on page 4 they are attorneys for both of them.

Mr. L. E. Lyon: Of course we are attorneys for both of them. I don't deny that.

Mr. Scofield: And they both have signed these pleadings by their attorney.

The Court: But the question is here, there is nothing to prevent the corporation B and W, Inc., from filing a supplemental answer and counterclaim and stating a controversy exists between it.

Mr. Scofield: I think there does.

The Court: And someone else? I suppose there is probably no justiciable controversy between Kenneth A. Wright, an individual, unless he is engaged in the business, is there? Is there any claim that this B and W is the alter ego of Kenneth A. Wright?

Mr. Scofield: No, but Kenneth A. Wright throughout this proceeding, your Honor, has been the one that was contending that there was this controversy. It was in the Patent Office that he contended that there was a controversy as to the validity of this patent. [4195]

The Court: Did he appear personally or as an officer of the corporation?

Mr. Scofield: No, he appeared there in the Patent Office as the inventor, as the patentee, and he was contending that this patent was fraudulently issued.

The Court: Does the record show whether or not he has any further interest in the patent or the invention?

Mr. L. E. Lyon: No, it is entirely assigned to B and W.

Mr. Scofield: I don't think that that quite is the problem we have here.

The Court: We are not interested in adjudicating a dispute between some bystanders who just happen to have an academic interest in this matter.

Mr. Scofield: That is right.

The Court: We are interested in adjudicating a justiciable controversy between parties who are entitled to have a financial interest in it.

Mr. Scofield: And, your Honor, the paragraph reads that a controversy exists between the plaintiff and the defendant with respect to the validity and the scope of the claims.

Now Wright himself is contesting the validity of this patent and did in the Patent Office?

The Court: Personally?

Mr. Scofield: Yes.

The Court: Or as an officer of the [4196] corporation?

Mr. Scofield: No, personally.

The Court: He appeared in the patent proceedings in person?

Mr. Scofield: Yes, sir. He appeared because he was the sole person that appeared, for instance in these interference proceedings, and when they set up these prior uses he was in every one of them contending personally.

Mr. L. E. Lyon: Because he was named in the complaint and in the public use proceedings. If we look at the file you will find it was filed by B and W, Inc., and not by Kenneth A. Wright. He is not even a party to it.

The Court: Is there any contention? As I understand it, it is undisputed that Kenneth A. Wright transferred all his interest in any patent or any invention to this corporation B and W, Inc., is that correct?

Mr. Scofield: Insofar as his patents are concerned.

The Court: Am I correct in that?

Mr. L. E. Lyon: Yes, your Honor; you are correct.

The Court: Very well. Then the corporation is at liberty if it pleases to file this supplemental answer and counterclaim on perhaps the corporation alone.

Mr. Scofield: They are at liberty to do so, but they have chosen to put Mr. Wright in here. And I don't want him dismissed. There is no reason for him dismissing it because he has contended throughout these proceedings, your Honor, [4197]

The Court: Now on this question of parties, gentlemen the parties are here, we want everyone bound that can be bound. Of course anyone in privity with any party who is bound would be bound.

Mr. L. E. Lyon: Which one of these is the exhibit, Dick?

The Court: If these agreements to license these intervenor plaintiffs provide that they are to be licensed under any new invention, any new patent issued to Hall, of course they should be parties.

Mr. Scofield: I was told this noon, your Honor, that the agreements did not include the improvements and that none had been licensed under the new patent as yet. Now I haven't checked the agreements.

Mr. L. E. Lyon: That is not true.

The Court: They are in evidence here, are they not?

Mr. Scofield: Yes, sir, they are in evidence. I haven't checked them.

Mr. L. E. Lyon: I think, your Honor, the agreement that exists between Hall and the Canadian corporation, for example, which started this matter off and which is Exhibit II, [4200] I believe—let's look at it—or QQ. And let's check this assertion.

May I have QQ or II, Mr. Clerk?

(The exhibits referred to were passed to counsel.)

Mr. L. E. Lyon: I think it is in evidence as a defendants' exhibit. It is Exhibit QQ, which I will place before your Honor.

Mr. Scofield: That has a termination date, has it not?

Mr. L. E. Lyon: The same thing was reiterated, as I believe, in QQ.

(The document referred to was passed to the court.)

Mr. Scofield: Those all terminate, your Honor.

Mr. L. E. Lyon: Sure, but the same thing is in effect for this year, according to your own pleadings.

Mr. Scofield: It goes out on December 31, 1952.

The Court: Is it intended to represent to this court that Mr. Hall does not intend to license the intervenors under this new letters patent?

Mr. Scofield: That is to be negotiated, your Honor. It is the very thing that is up now.

The Court: You may amend your supplemental answer and counterclaim, Mr. Lyon, but not to omit the defendant and counterclaim of Kenneth A. Wright, and you may include all of the parties to this action whom the counterclaim desires to [4201] name.

Mr. L. E. Lyon: That is all, so there will be no misunderstanding, it will be all of the parties named as plaintiff-intervenors at the present time.

The Court: All the parties to the action, including them whom the counterclaim chooses to allege is on opposing sides to this controversy. I take it that that, in effect, means only plaintiffs and intervenors?

Mr. L. E. Lyon: Plaintiff and plaintiff-intervenors.

The Court: Yes. You may amend it to include the question of infringement within the scope of the matters in controversy and any other particulars covered in your statement, with the exception of the omission of Kenneth A. Wright. Leave to dismiss Kenneth A. Wright from the supplemental answer and counterclaim is denied.

Mr. Scofield: Your Honor, may the plaintiffs have the privilege of filing this amendment to our complaint as an amendment to the complaint rather than under your Rule 14(d) so we won't have to retype the whole second amended complaint?

The Court: It is a supplemental complaint. It is something that has happened since the action began.

Mr. Scofield: Yes, sir, but under your rule here I understand that we must file a new pleading, retype the whole pleading, unless we get leave of court.

The Court: Yes. That is correct. You have leave to [4202] file a supplemental complaint charging infringement of letters patent 2,671,515, Exhibit 286 here, and you may charge infringement against any party to this action.

Mr. Scofield: Very well.

The Court: Now I think we understand the issues tendered by these supplemental pleadings. Is there any evidence to be offered other than that which has been offered?

Mr. L. E. Lyon: I would like to enter a stipulation that the evidence already included may be considered as the evidence offered on behalf of defend-

ants under the issues as raised by the supplemental pleadings filed this day, and the answer to which is still to be filed.

Mr. Scofield: I will so stipulate. [4203]

* * *

Mr. Scofield: I would like to file, your Honor, the reply to the supplemental answer and counterclaim, that is, the plaintiff's reply.

The Court: Mr. Lyon expects to amend his, why do you not hold it? Serve Mr. Lyon with a copy——

Mr. Scofield: He has a copy. [4221]

Mr. L. E. Lyon: I have received a copy.

The Court: Well, you know what changes he plans to make.

Mr. Scofield: I haven't made a note of them. I will have to get them from the record.

Mr. L. E. Lyon: The record will be supplied to us this evening. It is daily copy.

The Court: Perhaps it will save some amendments if you hold it until you receive the other.

Mr. L. E. Lyon: There is one ambiguity which appears in the record at the present time and which I desire clarification on, and that is with respect to this matter of the further prosecution of this suit in Kansas.

Your Honor has stated that he would direct that an injunction be issued. Does your Honor desire me to prepare that injunction and present it?

The Court: I understood from Mr. Scofield that he would withhold any further prosecution.

Mr. Scofield: That is correct.

Mr. L. E. Lyon: He declined to withhold the

matter of service or the matter to require us to employ counsel in Kansas in order to get an arrangement for further time.

Mr. Scofield: I agreed to withhold prosecution in Kansas.

The Court: Does that mean that you will recall any [4222] instructions to serve process in the case?

Mr. Scofield: I don't think I can now. I think that that is probably under way. It probably was served today or will be served tomorrow.

Mr. L. E. Lyon: It wasn't served today.

Mr. Scofield: I don't think I can stop that at the present time. But I did agree and I will withhold prosecution.

The Court: Will you endeavor to stop the service of process?

Mr. Scofield: Yes, sir, I will communicate with my office tonight.

The Court: If process is served I think it will be necessary to issue an injunction. I do not like to do that unless it is necessary.

Mr. Scofield: I will see if I can get hold of that. [4223]

* * *

Mr. L. E. Lyon: Your Honor, yesterday I called the court's attention to the practice of the United States Patent Office in the issuance of patents after the payment of final fees, and the fact that the applicant has knowledge of [4271] the date of issuance of the patent immediately after payment of the final fee, and in this case had information as to

the exact date of issuance of this patent, Exhibit 286, prior to or on February 4th of this year.

That is established by the following, and I am reading Rule 314 of the Rules of Practice of the United States Patent Office, January 1, 1953, edition, page 89:

“Issuance of patents: Every patent shall issue within a period of three months from the date of payment of the final fee, which shall be paid not later than six months from the date on which the application was allowed and the allowance and notice of allowance sent, and if the final fee be not paid within the period, his patent shall be withheld.”

In the absence of a request to suspend the issuance of the patent in three months, the patent ordinarily would issue in regular course in about five weeks. The issue closes weekly on Thursday, and the patents ordinarily bear date as of the fifth Tuesday thereafter.

May it be stipulated that that is the rule of the Patent Office?

Mr. Scofield: That is the rule, as I understand it.

Mr. L. E. Lyon: Also there is published in Washington, for the purpose of patent solicitors and those practicing before the Patent Office, the issue and closing dates, so [4272] that there will be no mistake; and this publication shows the last day of each week when a final fee may be paid to have the patent issue within a particular period of time.

You are familiar with that, I take it?

Mr. Scofield: I am familiar with the calendar.

Mr. L. E. Lyon: That calendar shows in small red "February 4" under the date of "March 9." That means, if the final fee is paid on February 4th. or between January 28th and February 4th, in the Patent Office, the patent would issue on March 9th.

So that in this case it is established by this calendar and this Rule that the final fee was paid to the Patent Office between January 28, 1954, and February 4th of this year, and immediately upon receipt of that final fee a receipt is sent out by the Patent Office which gives the patent number together with the date on which it will issue.

The Court: Is it so stipulated in this case?

Mr. Scofield: Yes, sir. Yes, sir.

Mr. L. E. Lyon: I will offer for the benefit of the record and to supplement my explanation the calendar as published, showing the issue and final-fee-payment dates, as the exhibit next in order.

The Court: Is there objection to the offer?

Mr. Scofield: No objection at all, your Honor.

The Court: Received in evidence. [4273]

Mr. Scofield: In fact, the only thing that delayed the payment of the fee was the fact that Mr. Lyon had not made this assignment to me.

The Court: By "this assignment" you refer to—— •

Mr. Scofield: The one that your Honor prepared.

The Court: ——the assignment that was made pursuant to the——

Mr. Scofield: Stipulated judgement.

Mr. L. E. Lyon: I believe the record should show that, pursuant to the stipulated judgment, the assignment has been delivered, has been executed by all of the parties, and an executed copy has been returned to us and that that matter is completely closed.

Mr. Scofield: That is at the present time.

The Court: Is a copy of that assignment in the record here now?

Mr. Scofield: No, your Honor, but I think it should be. I will have it photostated.

Mr. L. E. Lyon: I will give you my copy and I will offer it at the present time and ask leave to withdraw it.

The Court: The calendar offered and received would be Defendants' Exhibit——

The Clerk: HS.

Mr. Scofield: What is that, Mr. Clerk?

The Clerk: HS. [4274]

Mr. Scofield: HS?

The Clerk: Yes, sir.

(The document referred to, marked Defendants' Exhibit HS, was received in evidence.)

The Court: The copy of the assignment pursuant to the stipulated judgment relative to the agreement of September 15, 1944, will be received in evidence as Defendants' Exhibit HT.

(The document referred to, marked Defendants' Exhibit HT, was received in [4275] evidence.)

The Court: Before you move to that one, would you mind now telling me just as briefly as you can what about Hall Exhibit 286, where that is invention where the Wright patent is not? [4452]

Mr. Scofield: I think that you should hold the Hall 286 patent valid because the patent is a very narrow patent, specific to a particular device, and there has been nothing shown in this art, in the publications or any place in the literature, that precedes it.

The Court: In other words, you are suggesting it should be limited to the precise device described in the application.

Mr. Scofield: It must be, your Honor, and all patents must be. The claims of a patent——

The Court: We are referring to the range of equivalents now, I suppose.

Mr. Scofield: The range of equivalents in this patent is narrow because the patent is narrow.

The Court: Then, we will say “nil”?

Mr. Scofield: Nil. [4453]

* * *

The Court: You say that that exhibit is the apparatus described in Exhibit 286?

Mr. Scofield: This exhibit here?

The Court: Yes.

Mr. Scofield: Insofar as these claims are concerned, exactly that.

The Court: What number is that exhibit?

Mr. Scofield: That is 88, your Honor. That is one of the——

The Court: Is it constructed in the same manner as this apparatus?

Mr. Scofield: Exactly the same. But the distinction I was drawing, you see, insofar as the angularity of the wires, insofar as the collar is concerned, insofar as the fastening of the wires, everything is the same except in that drawing there the coils are radial. Do you notice that?

And we also in that particular patent showed tapered [4461] coils. That was a device of Hall's that he never could wind those wires tight enough at the end to make those coils that way as shown in that scratcher.

The Court: Do you mean to say it was impossible to manufacture what is disclosed by these drawings in Exhibit 286?

Mr. Scofield: No, as far as the tight pyramid coil is concerned. You see in one of the figures there, there is shown a pyramid type of coil.

The Court: That is Figure 6.

Mr. Scofield: Yes. And in order to coil those wires or to wind those coils, you have to bring them right down to a point at the top, and it was found that it was impossible to wind a coil that was satisfactory in that fashion.

The Court: There is no invention claimed on the manner in which the coils are wound?

Mr. Scofield: No, sir, there is no invention on that.

The Court: The invention claimed is in the invention of those whiskers or wires, or in the manner the bristles leave the periphery of the collar?

Mr. Scofield: That is the invention in this particular patent. That is the invention.

The Court: If someone else changed the angle of them he would not infringe?

Mr. Scofield: They would infringe. There is no angularity—— [4462]

The Court: In other words, Hall claims a monopoly on everything except the 90-degree angle, is that it?

Mr. Scofield: What it says in the patent. In the claims it says that:

“The stiff wire whiskers each flexibly attached at one end to said support and each projecting from a point on the periphery of the support at an angular inclination having sidewise direction with respect to the radius of the support drawn to said projection point of the particular whisker”——

The Court: Doesn't that describe the Wright apparatus?

Mr. Scofield: No. No, he does not have any sidewise inclination at all.

The Court: He has radial inclination, doesn't he?

Mr. Scofield: Well, that is not sidewise.

The Court: No. “Sidewise” means anything that is off the 90-degree angle.

Mr. Scofield: That is right, with respect to the radius, it says in the claim.

The Court: So what you are stating—I want to be sure I understand you——

Mr. Scofield: Yes, sir.

The Court: ——is that Wright has a monopoly

if the wires protrude radially, that is, at a 90-degree angle from the periphery of the collar. [4463]

Mr. Scofield: He would have that monopoly if it has not already been shown in the art; that is right.

The Court: Assuming——

Mr. Scofield: Yes, sir; assuming that was not already invented.

The Court: State it this other way: Where the wires extend from the periphery of the collar at a 90-degree angle, Hall does not claim any monopoly?

Mr. Scofield: That is right.

The Court: But where it changes a degree to right or left, he claims the monopoly?

Mr. Scofield: Yes, sir.

The Court: Right on up to the eighty-ninth degree?

Mr. Scofield: That is right, if all the wires have the same angularity or substantially the same angularity.

The Court: Suppose some man comes along and decides he will put every other whisker at a different angle, would he infringe Hall?

Mr. Scofield: That would be a question of equivalents we are entitled to. [4464]

* * *

Mr. Scofield: Your Honor, I will report that I got in touch with my office again, or they called me this morning, and the service has been held up in Kansas.

The Court: Very well. There will be no action taken in that case——

Mr. Scofield: No, that is right.

The Court: —pending the determination of this case——

Mr. Scofield: That is right.

The Court: —without the necessity of an injunction, as I understand it.

Mr. L. E. Lyon: I would like to ask, and for a matter of record, as to whether there has been any other publicity given to the issuance of this patent No. 286, such as sending copies of it or notices of it to anybody of any kind.

Mr. Scofield: No, there has not. There has not, to my knowledge.

Mr. L. E. Lyon: Then I deem it the injunction stands against any publicity, the same as with respect to all other matters.

Mr. Scofield: Why should there be an injunction, your Honor, against that patent?

The Court: You are referring to the injunction that was issued heretofore? [4521]

Mr. L. E. Lyon: Yes, your Honor, against any publicity in this suit with respect to any issue concerning this suit until the suit has been terminated.

The Court: The restraining order heretofore issued is in force and effect pending the determination of the case.

Mr. Scofield: Well, it is in force and effect, your Honor, with respect to those matters that you enjoined us against.

The Court: With respect to any matter involved in this litigation.

Mr. Scofield: That includes any publicity with respect to the patent in suit?

The Court: Whatever the injunction covers.

Mr. L. E. Lyon: Any patent in suit.

The Court: Anything that is involved in this case. The injunction is intended to stop trying the case to the trade instead of to the court.

Mr. Scofield: Yes, I appreciate that. [4522]

* * *

DEPOSITION OF ALFRED M. HOUGHTON
first having been duly sworn by the Notary Public,
was examined and testified as follows:

Direct Examination

By Mr. Scofield:

Q. Please state your name.

A. Alfred M. Houghton.

Q. Are you the same Alfred M. Houghton who gave a deposition in this case in January of this year? A. Yes—in 1950 it was.

Q. What was the date of that deposition, do you have it before you there?

A. January 9, 1950.

Q. Are you the patent attorney for Gulf Oil?

A. Yes, I am patent counsel for Gulf Oil Corporation.

Q. What do your duties include, Mr. Houghton, insofar as Gulf Oil is concerned?

A. I represent and advise Gulf in all matters having to do with patents, and also I advise them in connection with other matters, such as contracts and the like, acting as counsel for them in very many different matters.

Q. Do you handle any of the Gulf Oil Com-

(Deposition of Alfred M. Houghton.)

pany's foreign patent applications? A. I do.

Q. Do you handle all the foreign applications filed [2*] for Gulf Oil?

A. I supervise the filing of all of them.

Q. Do you counsel with the executives of Gulf Oil with regard to foreign patent matters?

A. Yes, I discuss them with them.

Q. Where are the headquarters of the Gulf Oil Company?

A. It is a corporation of the Commonwealth of Pennsylvania, with its office in the Gulf Building, Pittsburgh, Pennsylvania, about Seventh Avenue and Grant Street.

Q. Does the Gulf Oil Company operate in Canada?

A. I do not think so, as Gulf Oil Corporation.

Q. Do you know under what company name they operate in the Dominion of Canada?

A. No, I am not sure of that. I know they have some subsidiaries, and I think those subsidiaries are corporations of the United States which, perhaps, are registered to do business in Canada.

Q. Do you know whether the Gulf has production in Canada?

A. Not of my knowledge, but I have heard so.

Q. Do you know a Mr. Bohart?

A. I know of Mr. Bohart, yes.

Q. Do you know where he is located?

A. My impression is that he is either in [3] Tulsa, Oklahoma, or at Houston, Texas, I am not

(Deposition of Alfred M. Houghton.)

sure at this moment which. I have very little contact with him.

Q. To your knowledge, do you know whether or not he has anything to do with the Gulf Oil Canadian operations?

A. I would gather, yes, from information which has come to me from time to time.

Q. I put before you, Mr. Houghton, a United States patent, No. 2374317, which is in evidence in this case as Plaintiff's Exhibit 38. You know of that patent, do you not? A. Yes.

Q. How long have you know of the patent?

A. For quite a long time, I imagine, shortly after its issuance.

Q. You have had occasion, then, to familiarize yourself with the disclosure of the patent?

A. Yes. [4]

* * *

Q. I put before you a Canadian patent, No. 463822 issued on March 21, 1950, which has been marked for identification in this case as Defendants' Exhibit Q2.

Mr. Lyon: I believe that is an erroneous statement, because it has never been offered as Exhibit Q2.

Mr. Scofield: I did not say it has been offered; I said it had been marked for identification.

Q. (By Mr. Scofield): Do you have any knowledge of that patent? A. Yes. [6]

Q. When did you first learn of that patent?

A. Shortly after its issuance. It is our custom

(Deposition of Alfred M. Houghton.)

here to read the Canadian Gazette as it is issued weekly, and notice of this patent in that Gazette was observed by us shortly after the Canadian Gazette was received here, which was shortly after the date of the issuance of the patent, to wit, March 21, 1950.

Q. Does this Canadian patent bear on its face any indication or do you know whether it has any relationship to the Wright patent No. 2374317?

A. It is all printed on the face of the patent. The Canadian patent marked for identification as Exhibit Q2 bears a note that the convention date is December 10, 1940, United States of America, Serial No. 369389, and that serial number is the same serial number of the Wright application filed December 10, 1940, which matured into United States patent 2374317, dated April 24, 1940, Plaintiff's Exhibit 38.

Q. After you learned of this Canadian patent, 463822, Exhibit Q2 for identification, did you make any investigation of it?

A. Yes; we read it, considered it, tried to understand it, noticed the claims and posted ourselves to the extent we thought necessary in the event we should become interested in it at some time. [7]

Q. Did you call the issuance of the patent to the attention of the Gulf Oil Company?

A. I should say I probaly did. I would normally do that kind of a thing, trying to keep them posted as to the patent situation.

(Deposition of Alfred M. Houghton.)

Q. Who in the Gulf Oil Company would you communicate such matters to?

A. Well, I do not know in this case exactly to whom I called the attention of this patent, but it was probably Dr. B. B. Wescott of Gulf Research and Development Company, or Mr. Leslie Vollmer there.

Q. Where are those gentlemen located?

A. They are located with Gulf Research and Development Company, a subsidiary of Gulf Oil Corporation, having its research laboratories at Harmarville, Pennsylvania.

Q. To your knowledge, did the issuance of this Wright patent, 463822, have any effect on the purchase by Gulf Oil of the scratcher equipment which they were purchasing in Canada?

A. No, I don't think it had any bearing on that.

Q. I show you Canadian patent 472221, marked for identification in this case as Defendants' Exhibit Q1. Have you any knowledge of that patent?

A. Yes. This came to our attention in the same way as the patent marked for identification Exhibit Q2. It was [8] published in the Canadian Gazette as a reissue, and we ordered copies and studied it.

Q. Did you make any investigation of this Wright reissue patent after it came to your attention?

A. Yes. In the normal course of work, being interested in this situation, we compared it with the Canadian patent 463822 to determine the difference in the claims over that patent.

Q. What relationship did you find that this re-

(Deposition of Alfred M. Houghton.)

issue patent 472221 bore to the former Canadian patent 463822, if any?

A. Well, the comparison of the two will speak for itself.

My recollection, without now studying these patents, is that we found that claims or some of them in some respects were slightly different from the claims in 463822.

Q. Did you find that the patent 472221 was a reissue of 463822?

A. Well, it purports to be.

Q. Did you find from your investigation that the reissue patent bore any relationship to the United States Wright patent 2374317?

A. It was very much like it, except that it appears to contain some claims which do not appear to be in the Wright patent 2374317. [9]

Q. Did you find from your investigation that the Wright reissue bore any relationship on its face to the earlier United States Wright patent 2374317?

A. Well, that also speaks for itself, 472221, on its face, is stated to be a reissue patent of 463822.

Q. My question, Mr. Houghton, was whether or not it bore any relationship on its face to the United States Wright patent 2374317?

A. Well, I thought I was going to bring that out. I was going to add more to my statement.

Q. I am sorry I interrupted you.

A. Being a reissue of the Canadian patent 463822, and that being based on convention applica-

(Deposition of Alfred M. Houghton.)

tion claiming United States Serial No. 369389, and United States Serial No. 369389 issuing into United States patent 2374317, the relationship is apparent.

Q. Well, do you find on the reissue Wright patent, the Canadian patent, the filing date of the United States application which matured into the United States Wright patent 2374317?

Mr. Lyon: That is asking the witness to compare documents. It is objected to on that ground. The documents speak for themselves. I do not see any reason for asking this witness to make a comparison of documents, which anyone can make. [10]

The Witness: I do not see any printing, anything of that sort, but it is obvious to anyone that my explanation is right. The reissue, 472221, is a reissue of another Canadian patent, 463822, and that is based on the application which matured into the United States patent 2374317.

Q. (By Mr. Scofield): On the syllabus heading of reissue patent 472221, do you find the filing date of the United States Wright patent, December 10, 1940?

A. Yes, I do see it now. It says on the reissue application October 25, 1950, Serial No. 607200 in the United States December 10, 1940, which is the filing date of the application which matured into United States patent 2374317.

Q. Did you receive any notice from W. & B. or Kenneth Wright of the issuance of this reissue patent, and I am referring to the Canadian reissue?

A. My memory is that after we had found it in

(Deposition of Alfred M. Houghton.)

the Gazette, Mr. Wright sent me copies of claims of Canadian patents which had been issued him, and I think that they were the claims in Canadian patent 463822 of March 21, 1950, and Canadian patent 472221 which issued March 13, 1951. That is my best memory as to that.

Q. Do you have a record of when those claims were sent to you by Mr. Wright? [11]

A. I am sure that they must be here. I will look it up.

Yes, I have a letter here dated April 3, 1951, directed to me, and signed B. & W., Inc., by K. A. Wright. [12]

Q. May I see the letter, please?

A. I will read it into the record, if you wish me to.

Q. In view of the fact that the letter has the date stamp of your office on it, would you object to my offering a photostat of it in the record as an exhibit for identification?

A. No, I have no objection.

Q. Would you like to have the reporter mark the letter dated April 3, 1951, on the letterhead of B. & W., Inc., addressed to Mr. A. M. Houghton, and signed K. A. Wright, as Plaintiff's Exhibit 73 for identification, and it is my understanding, Mr. Houghton, that with this Wright letter there was enclosed the claims of this reissue Canadian patent, Exhibit Q-1 for identification?

A. That is my recollection.

(Deposition of Alfred M. Houghton.)

(The letter referred to was marked Plaintiff's Exhibit No. 73, for identification.)

Q. (By Mr. Scofield): Do you have the copies of the claims in your file that were——

A. Oh, yes, I have them here.

Q. I would like to have the copies of the claims marked as Plaintiff's Exhibit 73-A for identification, and Plaintiff's Exhibit 73-B for identification.

(The claims referred to were marked Plaintiff's Exhibits 73-A and 73-B [13] for identification.)

The Witness: I am willing that you make copies of these and use them as you see fit.

Q. (By Mr. Scofield): I thought——

A. But I object very seriously to letting my files go out of my office for that purpose, so arrangements will have to be made with your reporter that he copy them here.

Q. Well, would it be satisfactory to you to have photostats made and let me pay for the copies of the photostats? You have them made from your office if you would rather not deliver them.

A. Yes, I will attend to that for you. I will have photostats of these two papers made and deliver them to the reporter, and would expect you to pay for them.

Q. I shall try to fulfill your expectations.

On the receipt of this letter from Mr. Wright, what did you do next? Did you make further investigation of this reissue patent?

(Deposition of Alfred M. Houghton.)

A. I do not think so; I had already considered the patent. I note that in my receipt date stamp, which is April 9, 1951, on this letter, there is in the space "Refd To," there is a notation "JHL," so that it was referred to Mr. James H. Littlehales, for whom these initials stand, for his consideration. The claims being the same as those I had already considered, I do not think we did anything [14] further about it.

Q. Had you prior to the receipt of Mr. Wright's letter on April 3, 1951, notified anyone in the Gulf Oil Company with regard to the Wright Canadian patent 472221?

A. I believe I had, because we knew of this patent before we received these copies of the claims.

Q. With whom did you communicate information that the reissue patent, the Wright reissue, had been granted in Canada before April 3, 1951?

A. Oh, my, I don't know the particular individual, and I don't know the exact date. I can probably refresh my recollection by going through correspondence, if I have any, on the subject.

It was my custom to keep Mr. Wescott and Mr. Vollmer posted in all matters of this sort, because I knew they were interested, and if I wrote a letter it was probably directed to Dr. Paul Foote, who is executive vice president of Gulf Research and Development Company.

Q. Do you have a record of communicating with him prior to April 3, 1951?

A. What was that date?

(Deposition of Alfred M. Houghton.)

Q. April 3, 1951, the date of Mr. Wright's letter.

Mr. Lyon: Mr. Houghton, just so there may be no mistake, where is that letter from Mr. Wright? The question asked you was prior to April 3. Your receipt stamp shows [15] that you received it April 9.

Q. (By Mr. Scofield): You can answer the question, then, as to April 9, if anytime prior to April 9 you had communicated with Gulf Oil.

A. The record, so far as I now can see, shows the first written communication to be to Dr. Paul D. Foote, dated May 10, 1951, which is subsequent to the receipt of these claims from Mr. Wright, with his letter of April 3, 1951.

Q. Do you have a copy of a letter that you wrote to Mr. Foote on May 10, 1951?

A. Yes, that is what I am looking at now, to refresh my recollection.

It relates to quite a number of other matters, but there is a statement in it. "Wright has obtained Canadian patent 472221 (copy enclosed) issued March 13, 1951, on well-conditioning method which includes the step of cementing. It is interesting to note that the Canadian patent departs in this respect from the disclosure and claims of the Wright U. S. patent on well-conditioning. In view of the issuance of this patent to Wright, it is somewhat problematical that Hall can patent the same or substantially the same cementing method in [16] Canada."

Q. Was that the only mention in your letter to

(Deposition of Alfred M. Houghton.)

Mr. Foote of May 10, 1951, of the issuance of the Wright reissue patent No. 472221? A. Yes.

Q. Are there matters in that letter that are of such nature that you would rather not have the letter photostated as an exhibit in this case?

A. Yes. There are matters there that I don't think are pertinent to the issues here, and which are in the the nature of confidential communications to my client.

The letter refers to matters I had heard—maybe all hearsay—I just wrote it trying to keep Dr. Foote and his associates posted.

Q. Are there any other references in the letter to the Hall-Wright litigation? A. Oh, yes.

Q. Would you have any objection to reading such parts of the letter that have reference to the Hall-Wright matter?

A. The Gulf Oil Corporation and Gulf Research and Development Company have been very much disturbed by the unsettled patent situation between B. & W., on the one hand, and Weatherford Company, on the other hand, and, therefore, as any information comes to me, no matter of what kind, I try to keep them posted. [17]

* * *

Q. (By Mr. Scofield): In view of Mr. Lyon's objection, would you have any objection to letting me offer a photostat of this letter as an exhibit for identification in this case?

A. No. I think it will be harmful to your case, but go ahead.

(Deposition of Alfred M. Houghton.)

Mr. Scofield: All right. It is requested that the reporter mark the letter for identification as Plaintiff's Exhibit 74. [18]

(The letter referred to was marked Plaintiff's Exhibit No. 74, for identification.)

The Witness: May I make a statement?

Q. (By Mr. Scofield): Yes, go ahead.

A. This letter should be considered from the standpoint I just explained. It may have some opinions of mine as to the patent situation. It may be based on things that I had heard, matters which I had not definitely checked, and should be read in that light.

Q. Well, I am sure that the Court, in reading the letter, will view it with the suggestions that you have made.

Mr. Lyon: In view of the witness' statement, we renew our objection to any consideration of the letter as incompetent, irrelevant, and immaterial, being based on hearsay.

Q. (By Mr. Scofield): Did you receive from Mr. Foote any reply to this letter of May 10, 1951?

A. Yes, I did.

Q. Marked here as Plaintiff's Exhibit 74?

A. Yes. I received a memorandum from him dated May 21, 1951, referring to the letter in which he says:

"It is our understanding that you think this [19] patent may be ignored despite the fact that it

(Deposition of Alfred M. Houghton.)

would be infringed by the use of Weatherford scratchers and centralizers in Canadian Gulf's casing cementing operations. Wright's Canadian patent is considered invalid since it is based on his U. S. method patent which does not cover casing cementing."

Q. Would you have any objection to my offering a photostat of that letter or marking it for identification?

A. Yes, I would; but I suppose I have to give it to you if you want it. The fact is that the letter was an entire mistake. His understanding, stated in his letter that this patent may be ignored, was erroneous. I had not said so.

Q. Well, I think the letter will stand for itself, and I should like to have the reporter mark the letter as Plaintiff's Exhibit 75 for identification.

A. Yes.

(The letter referred to was marked Plaintiff's Exhibit No. 75, for identification.)

Q. (By Mr. Scofield): Did you make any reply to Mr. Foote's letter of May 21, 1951, marked here as Plaintiff's Exhibit 75 for identification? [20]

A. I think I must have. I would not let a misunderstanding of that sort stand.

Yes, I did, on May 28, 1951, I wrote to Dr. Foote again, replying to his letter of May 10—no, replying to his letter of May 21, in which I stated:

"I regret that my letter of May 10 led you to the understanding that the recent issued Canadian patent to Wright may be ignored, despite the fact that

(Deposition of Alfred M. Houghton.)

it would be infringed by the use of Weatherford scratchers and centralizers in Canadian Gulf casing cementing operations," and then I go on to say that although B. & W. has not indicated an intention to enforce this patent against Gulf, it is, under the circumstances, in position to do so.

Q. I should like to have the reporter mark that letter as Plaintiff's Exhibit 76 for identification.

A. You will understand it gives my interpretation of an opinion regarding this patent. It sort of gives the history of the situation with respect to the patent, and it includes the sentence, "Accordingly, the claims of the reissue patent, in my judgment, cover the use of Weatherford scratchers in casing cementing operations."

At that time I was not considering the validity of the patent and had no definite knowledge of anything which would invalidate it, but I seemed to be interested [21] primarily in whether or not it was entitled to the convention date, as claimed, thinking that if it was not, then I might be able to find some anticipating art. After a study I decided it was entitled to the convention date.

Q. When you—pardon me, are you through?

A. Yes.

(The letter referred to was marked Plaintiff's Exhibit No. 76, for identification.)

Q. (By Mr. Scofield): When you investigated this Wright reissue patent, and before you wrote to Mr. Foote with respect to the patent, did you

(Deposition of Alfred M. Houghton.)

give any consideration to the Hall-Wright contract in this connection? A. Yes, I think I did.

It occurs to me now that before my letter to Dr. Foote calling attention to this Canadian patent——

Q. That is May 10, 1951.

A. All right—I had mentioned it on the phone to Mr. Leslie Vollmer, and it is my recollection that this was before I received the copies of the claims from Mr. Wright.

I remember that Mr. Vollmer seemed to have difficulty in understanding this question of convention, and he seemed to think that if in the original United States application, [22] although disclosed certain matter was canceled, that it would bind the prosecution in Canada, and that Wright would be estopped to claim that matter in Canada. In other words, he thought, as I understood him, that the patents had to sort of exactly correspond, and that Wright could not claim convention date because of the prosecution in the United States.

I did not agree with that, and tried to explain to him that if a complete copy of the Wright original application maturing into the Wright U. S. patent 2374317, as filed in Canada or as relied upon, disclosed the matter claimed in Canada, that as far as I could see, Wright was entitled to the benefit of that date. [23]

* * *

Q. Did you communicate further with Mr. Foote

(Deposition of Alfred M. Houghton.)

after your letter of May 28, 1951, with respect to this Wright reissue patent?

A. I may have. Yes, I did on June 20, 1951; I communicated with him again on this subject, referring to an article by Barkis and Wright published in *International Oil*, October, 1941, which he had run across, and which he sent me.

Q. What is the date of that letter?

A. June 20, 1951; and I told him that I had made a more thorough study of the Wright Canadian patent and its relationship to the Wright United States patent, as a result of which it was my conclusion that Wright is entitled to rely upon the filing date of his U. S. case, namely, December 10, 1940, since his Canadian application was properly filed under the international convention, and in view of that conclusion, the October, 1941, publication [24] would not, in my opinion, be a reference upon which we could rely in defense of a suit for infringement of the Wright patent.

I said, accordingly, that I was still of the opinion that we should respect the patent and not open ourselves to a charge of infringement, but allow Mr. Hall to take the initiative in attacking the patent if he considers it desirable to do so.

Q. I believe you indicated in your answer that there was a publication referred to in this letter?

A. Yes. I said it was *International Oil* of October, 1941. I don't think I gave you the title, "Casing Movement While Cementing." That is the title.

Q. That is or is not the title?

(Deposition of Alfred M. Houghton.)

A. That is the title.

Q. Is there a copy of the publication attached to your letter copy?

A. Yes, sir. It is attached to a letter from Dr. Foote when he forwarded it to me, a very interesting publication.

Q. Now, is this letter of June 20 a letter which you wrote to Foote or from Foote to you?

A. The letter of June 20 is a letter I wrote to Foote acknowledging receipt of the publication.

Mr. Scofield: I should like to have the reporter mark [25] the letter dated June 20, 1951, as Plaintiff's Exhibit 77 for identification.

(The letter referred to was marked Plaintiff's Exhibit No. 77, for identification.)

Mr. Scofield: I should like to have the reporter mark the copy of the publication as Plaintiff's Exhibit 77-A for identification.

(The publication referred to was marked Plaintiff's Exhibit No. 77-A, for identification.)

Q. (By Mr. Scofield): When you wrote this letter of June 20, 1951, had you at that time had any communication with the firm of Lyon and Lyon or any of the members thereof?

A. Oh, probably; they dropped in to see me once in a great while, just as you do. Sometimes they, as well as you, send me copies of decisions in Patent Office interference matters.

Q. Did you see anybody from the firm of Lyon and Lyon during June, 1951?

(Deposition of Alfred M. Houghton.)

A. I think so. I am not sure; I will have to check up on that.

Q. Do you have a record of that there?

A. On June 19, I had a letter from Lyon and Lyon, [26] stating:

“When I was last in Washington I stated that I would advise you with respect to the Hall vs. Wright case set for today, June 19. The case was called today by the Court.”

I do not know what else this has to do with him—oh, yes. He says:

“I enclose a decision of the Commissioner of Patents in the Hall vs. Wright interference directing the primary examiner to finally reject the pending Hall application, Serial No. 55619, thereby concluding that no patent should be granted to Hall upon his application.”

Q. Is that a letter from Mr. Leonard Lyon to you?

Mr. Lyon: No, it is a letter from Mr. Lewis Lyon.

The Witness: No, it is not.

Q. (By Mr. Scofield): That is a letter from Mr. Lewis Lyon to you, Mr. Houghton?

A. Yes.

Q. Now, had you seen Mr. Lewis Lyon or Mr. Leonard Lyon during the month of June, 1951?

A. I don't know, but this letter starts out to say:

“When I was last in Washington I stated I would advise you with respect to the Hall vs. Wright [27] case,” so he probably was down in Washington

(Deposition of Alfred M. Houghton.)

sometime previous to that when he made that statement.

Q. Do you now have any recollection of a visit with Mr. Lewis Lyon prior to this date of June 19, 1951?

A. Oh, no definite recollection of the time or what was discussed. I see him very seldom.

Mr. Scofield: I should like to have the reporter mark the letter of June 19, 1951, written by Mr. Lewis Lyon to Mr. Houghton, as Plaintiff's Exhibit No. 78 for identification.

(The letter referred to was marked Plaintiff's Exhibit No. 78, for identification.)

Q. (By Mr. Scofield): Now, is it my understanding that he enclosed a copy of some Patent Office paper with that letter? [28]

A. Yes. A copy of the decision of the Commissioner of Patents in the Hall v. Wright interference, No. 84411.

Q. Well, I think that that paper has already been marked for identification in the interference as one of the defendants' exhibits, so it will not be necessary to make a copy of that paper——

* * *

Mr. Scofield: I believe it is in evidence as your exhibit, or it is marked for identification as your Exhibit T, so I do not believe it will be necessary to duplicate that exhibit.

Q. (By Mr. Scofield): Did you have any other

(Deposition of Alfred M. Houghton.)

communication with Mr. Foote or with the Gulf Oil or Gulf Research? A. Yes. I wrote——

Q. After this June 19th letter?

A. Yes. I wrote to Dr. Foote on June 21, advising him about the decision, and explaining it in part, just to keep him posted. [29]

Mr. Scofield: I would like to have the reporter mark the letter of June 21, 1951, from Mr. Houghton to Dr. Foote, as Plaintiff's Exhibit 79 for identification.

(The letter referred to was marked Plaintiff's Exhibit No. 79, for identification.)

The Witness: It refers to Wright's attorney advising me that the California suit had been postponed. I did not send him a copy; I just discussed it.

Q. (By Mr. Scofield): Do you find in your file any further communication with Gulf Research & Development or any communication from them after June 21, 1951, with respect to this Hall matter or the Canadian situation?

A. After June what?

Q. 21, I believe your last letter was, was it not?

A. Yes. On July 17, 1951, I wrote to Dr. Paul D. Foote, again referring to that decision denying Hall a right to a patent, and instructing the examiner to finally reject the claims; and apparently somebody had advised me that Hall had filed a petition for reconsideration. I think it was you, Mr. Scofield.

(Deposition of Alfred M. Houghton.)

Mr. Scofield: I would like to have that letter marked as Plaintiff's Exhibit 80 for identification.

(The letter referred to was marked [30] Plaintiff's Exhibit No. 80, for identification.)

The Witness: This is just resulting in opening up all of my files, and I consider a lot of this confidential communications.

* * *

Q. Well, I think that the Court will take that into consideration in reading these letters, Mr. Houghton. Do you find any communication after July 17, 1951?

A. From whom and to whom?

Q. Between you and Gulf Research.

A. Yes. Here is a letter of July 24, 1951, which appears [31] to be the next one. It is to Dr. Foote, entitled this subject.

Q. Was this a letter from you to Dr. Foote?

A. Yes; and it relates to an entirely different matter. You will have to take my word for that. But as long as you appear to be interested whenever I saw Mr. Lyon, it does make reference to the fact that Mr. Wright and Mr. Lyon were here the day before, which would be July 23, 1951——

Mr. Lyon: July 23?

The Witness: July 23, 1951.

Mr. Lyon: Pardon me, I thought you said July 22nd.

Q. (By Mr. Scofield): Had you heard from Mr. Lyon prior to this visit in any way?

(Deposition of Alfred M. Houghton.)

A. Mr. Lyon phoned me around July 19. Mr. Littlehales of my office took the message, that he would like to see me Monday morning, July 23.

Q. Do you know whether that was a phone call that was made here in Washington, or was it a long distance call?

A. The memorandum says that "Mr. Lyon phoned me today"—that being Mr. Littlehale's—no, it was my initials which are on it, apparently. I received the call. It says that he "phoned me today at 3:30 p.m., from Los Angeles, he would like to see me Monday morning next, July 23." [32]

Q. Did he indicate in that phone call what he wanted to see you about?

A. I don't think so. I imagine it was this other matter that we were referring to which, as far as I can see, has nothing to do with this situation.

Q. Did Mr. Wright and Mr. Lyon come on and have a meeting with you?

A. Yes, they did.

Q. On July 23, 1951? A. Yes, they did.

Q. Did you hear from Dr. Foote on any other occasion during July, with respect to the Wright Canadian situation?

* * *

Q. Did you receive a copy of a letter that Mr. Foote wrote to Mr. Bohart? A. About when?

Q. On or about July 23, 1951.

A. Yes, there is a letter of July 23, 1951, or a memorandum from Dr. Paul D. Foote to Mr. P. H. Bohart.

(Deposition of Alfred M. Houghton.)

Q. How is that name spelled?

A. B-o-h-a-r-t. [33]

Q. Was that received with a letter from Dr. Foote? A. No, apparently not.

Q. What is the date of that letter from Dr. Foote to—— A. July 23, 1951.

Q. Does that pertain to this Canadian situation?

A. Yes; it refers to the Canadian patent 472221, and states that, "After study Mr. Houghton has reached the opinion that this patent for cementing casing covers the method casing that is being used in Gulf's Canadian operations. Therefore, the use of scratchers other than those sold by B. & W., Inc., for casing cementing in Canada would be an infringement of the Wright Canadian patent. Mr. Houghton has the further opinion that we should respect the Wright Canadian patent and not open ourselves to a charge of infringement. For the time being at least it is indicated that only B. & W. scratchers should be used for Gulf's casing cementing operations in Canada."

Mr. Scofield: I should like to have the reporter mark that letter as Plaintiff's Exhibit 81 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 81, for identification.)

Q. (By Mr. Scofield): Did you have a conference in Pittsburgh some time in August, at which time this Canadian situation was [34] considered by the Gulf Oil Company?

(Deposition of Alfred M. Houghton.)

A. What time are you talking about now?

Q. In August, 1951. Was there a conference in Pittsburgh? A. Yes.

Q. About what date was that, Mr. Houghton?

A. Around August 20, 1951.

Q. Do you have any record of who attended that conference? A. Yes, I do.

Q. Who was there, please?

A. Mr. P. O. Settle, Assistant General Counsel of the Gulf Oil Corporation; Dr. B. B. Wescott, of Gulf Research & Development; Mr. Leslie Vollmer, of Gulf Research & Development; Mr. James H. Littlehales, of the Patent Department, and myself.

Q. Is Mr. Littlehales the same Mr. Littlehales, who sits by your side here now?

A. Yes, sir.

Q. Did you make a report to Mr. Foote after the meeting with respect to what was considered?

A. Yes, sir; I did.

Q. What was the date of that report?

A. August 21, 1951.

May I volunteer a statement here? I don't know how far [35] I can go in doing that kind of thing.

Q. Well, I would prefer if you did not make a statement other than answer the question, Mr. Houghton. I am sure that Mr. Lyon will not want anything on the record other than what pertains to our particular matter here under consideration.

A. Well, we did have that conference up there on August 20, and I reported the results to Dr.

(Deposition of Alfred M. Houghton.)

Foote on August 21, and the conference was had as a result of my calling Dr. Wescott a few days before, stating I was very much fed up with this whole situation. I was being harassed by the attorneys for the respective parties, particularly Mr. Scofield for Hall, apparently in an endeavor to try to persuade me to make reports favorable to one side or the other, and you were down here to see me somewhere around that time, and I told you that I was going to have such a conference and try to settle this matter once and for all as to the stand we could take, at least temporarily, in this very complicated situation.

Q. Do you have any record of my being in Washington, during the months of either July or August of 1951, in your file?

A. No; I only have a recollection that you were here. I don't know that there is any record here of that. I have not seen it as I went through these papers. We discussed the [36] matter thoroughly.

Q. Do you have a definite recollection now——

A. And I was pretty well peeved at the whole situation, and I thought the tendency here to use a nebulous patent situation was far beyond the scope of what patents should be used for.

Q. Do you have now a definite recollection that I personally interviewed you or met with you during the months of July or August, of 1951?

A. I have a recollection of such a meeting. As to the exact date, I don't know, but I reason out it

(Deposition of Alfred M. Houghton.)

must have been at that time because I know it was shortly before I went up to Pittsburgh. The reason I remember that is I told you I was going up there, and you phoned me once or twice to see what was the result of the meeting.

Q. Well, is it your recollection that these conversations between you and me were personal conversations or by long distance phone?

A. The latter ones were long distance phone, but the first one that I am referring to was here in my office. You were here.

Q. You do not have any record of when that was?

A. I don't find any record of the exact date of that.

Mr. Scofield: I would like to have the reporter mark the letter of August 21, 1951, as Plaintiff's Exhibit 82 for [37] identification.

(The document referred to was marked Plaintiff's Exhibit No. 82, for identification.)

Q. (By Mr. Scofield): I think in a previous answer you indicated that there was some particular circumstance that provoked the meeting on August 20. Do you have any recollection as to just what did bring about that meeting that you had in Pittsburgh?

A. Yes. I was being very much provoked at this situation. It was interfering with my business constantly, and I was getting a little tired of taking all the responsibility of rendering these opinions and

(Deposition of Alfred M. Houghton.)

everything, and I wanted to confer with the Law Department, which was then represented by Mr. P. O. Settle, the Assistant General Counsel, and with Dr. Wescott and Mr. Vollmer, to see if we couldn't reach some decision to take a stand in this matter, adopt a policy, at least temporarily, and to relieve myself of this constant interference; and I called Dr. Wescott making that suggestion for a conference, and he arranged it, and it was had, as a result, on August 20, 1951.

Q. Getting back to this meeting that you had with Mr. Wright and Mr. Lewis Lyon on July 23, I believe that was Monday? [38] A. Yes.

Q. Did either Mr. Lewis Lyon or Mr. Wright, indicate to you in that meeting that there had been a pre-trial hearing on the previous Monday, July 16, in California, in this case?

A. I think so; I believe so. I think it was at that meeting I got that information.

Q. Did Mr. Lyon or Mr. Wright during that meeting indicate to you that I had told the Court on that occasion, that suit had been brought in Venezuela against Mr. Wright's representative or B. & W.'s representative in Venezuela?

A. I got that information somewhere, and it probably was at that meeting.

Q. Did Mr. Lewis Lyon at that time indicate to you that he had not been advised that suit had been brought in Venezuela by Hall?

A. I don't remember that. We did not go into any details about it.

(Deposition of Alfred M. Houghton.)

Q. Did Mr. Lewis Lyon indicate to you at that meeting you had on July 23, that he was going to Venezuela to find out what the situation was down there?

A. Yes, he did, and he asked my good offices to give him the names of people that he might see in the Mene Grande Oil Company. I didn't know who he should see.

Just as I have helped you in matters like that, giving [39] you names of Gulf people at your instigation, I thought it was duty to give him the names, and I went so far as to phone somebody in Pittsburgh to get the names of those people, because I was not acquainted with them. I do not know the setup of Mene Grande, and I gave him those names so that he could go down there and make what investigation he might be advised to make.

Q. Who did you phone in Pittsburgh with respect to this?

A. I think I phoned Mr. Vollmer.

Q. What names did you give to Mr. Lyon?

A. You will have to get that from him. I don't think I kept a memorandum of that. I just gave them to him over the phone, and I think he jotted them down. I don't think I have a memorandum of that. I wasn't interested, particularly.

Q. Did you give him the name of the Gulf attorney who represents Gulf or Mene Grande in Venezuela?

A. That I don't know. I don't know if I gave

(Deposition of Alfred M. Houghton.)

him a name, and I don't know that I identified the person. It was all very casual.

Q. This letter that you wrote on July 24, 1951, to Gulf Research & Development the day after you had talked to Mr. Wright and Mr. Lyon, was that with respect to this Venezuelan situation?

A. What date was that letter, please? [40]

Q. July 24, 1951.

Mr. Lyon: Wrote to whom?

The Witness: You are going to introduce a copy of this letter?

Q. (By Mr. Scofield): Who is it addressed to?

A. It is addressed to Dr. Foote. There is a mention in there about Venezuela.

Mr. Scofield: I would like to have the reporter mark the letter written by Mr. Houghton to Dr. Foote as Plaintiff's Exhibit 83 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 83, for identification.)

The Witness: I believe you have got that letter in there.

I think there should be strenuous objection to this. It relates primarily to the other matter which was under consideration, and I——

Q. (By Mr. Scofield): What was the other matter that was under consideration, Mr. Houghton?

A. It was a matter between Mr. Lyon and myself, as to offering when he sold us scratchers, if we purchased them, to let the purchase price include a royalty, which would give [41] us a license im-

(Deposition of Alfred M. Houghton.)

munity under all patents which might cover the use of it.

Mr. Scofield: I think the letter is pertinent, and I should like to have it marked, if you will, please. That is Exhibit 83.

The Witness: I objected to the procedure because there might be an implied admission of validity of the patent that we might take a royalty under. I later secured from Mr. Lyon a statement that that would not be so, and he would not hold us to that, and I think I approved the purchase of the scratchers under those conditions. It was all an entirely different matter from any Canadian patents or anything of that sort.

Q. (By Mr. Scofield): Did you ever communicate directly with an attorney by the name of Zuloaga in Venezuela, in behalf of Mr. Lyon in this matter?

A. No, not that I remember.

Q. Did you ever communicate directly with any of the employees of Mene Grande in Venezuela, on behalf of Mr. Lewis Lyon in this matter.

A. I may have written a letter down there about it, but I don't remember it. It would certainly be a normal thing to do. About what date would that be? When was he, Mr. Lyon, in to see me? [42]

Q. Mr. Lyon was in to see you, according to your previous testimony, on July 23, 1951. I have no objection, if you care to, to ask Mr. Littlehales. He knows or is a little more familiar with these files than you are.

(Deposition of Alfred M. Houghton.)

A. I have a file here.

Mr. Lyon: You wrote a letter for me on——

The Witness: I wrote a letter on July 23, 1951, to Mr. Hoyt Sherman, Caracas, Venezuela.

Mr. Scofield: I should like to have the reporter mark that letter of July 23, is it, 1951, as Plaintiff's Exhibit 84 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 84, for identification.)

Mr. Lyon: I have to object to that on the ground that it is an entirely incompetent, irrelevant and immaterial matter, and further on the ground that although the letter was written for me by Mr. Houghton it was never used nor delivered, to Dr. Hoyt Sherman or anybody else. I still have the original.

Mr. Scofield: Maybe you would like to state on the record what you did with respect to this letter?

Mr. Lyon: Nothing; I have still got it.

Mr. Scofield: I mean what you did in Venezuela after you got there, with respect to the letter. [43]

Mr. Lyon: I did nothing with respect to the letter.

Mr. Scofield: Well, let the letter be marked, please.

Q. (By Mr. Scofield): Was the Venezuelan litigation discussed at all in this conference had in Pittsburgh on August 20, 1951?

A. No, only in a most general way in the sense that the parties were litigating in the United States,

(Deposition of Alfred M. Houghton.)

and we thought there was some litigation going on in Canada. I think you had advised me that you were going to file some petition, or had filed some petition, to cancel the Canadian Wright patent, and in a general way it was merely said that was the trouble here; all this litigation between the parties, the controversy, is of their own making, and that we cannot keep on being involved in this all the time, so let us make some decision as to what we should do, and it was decided that since Gulf always respected the patents of others, that having been our policy for years, we would take this situation as it existed from the patent standpoint, and since Wright had a patent in Canada covering the operations we would conduct until we had reason to know that that patent did not cover those operations or was invalid, we would respect it; and therefore we thought we should advise what we called the field to buy only B. & W. scratchers in Canada, and thus respect that patent, until conditions changed or we wished to advise otherwise. [44]

As regards the United States, we decided there was a controversy going on. The parties seemed to think that I, as patent counsel, should interpret the old contract between Wright and Hall, make a decision as to what will ultimately happen in this litigation; and I have taken the stand constantly that since there is this litigation the Court should decide such matters, and the very fact that there is a litigation shows that there is doubt, at least as to the patent situation in the United States.

(Deposition of Alfred M. Houghton.)

Q. Were you furnished a copy of a letter——

A. I don't think you let me finish my statement. I think my answer was germane, and I would like to continue.

Q. I am sorry that I interrupted you; go ahead, Are you answering a question here?

A. I am trying to.

Q. Proceed, Mr. Houghton.

A. The parties seemed to think that I should interpret that contract, when the very interpretation of it, apparently, is going to be up to the Court, and I think this very Court, and they expected me to make decisions in their favor as to the purchasing of the scratchers, and I knew enough from the contract to know that there was nothing definite at the present time from the standpoint of which side had a patent that we should have to respect, and I so reported at the conference, and said in my opinion that we were not [45] obligated to prejudge this matter, that the Court was going to judge, and we should consider that there is no patent situation in the United States that we should have to respect and, therefore, the field could buy the scratchers in the United States from whomever it pleased.

Then, we took up the Venezuelan situation; only discussed it briefly from that standpoint, paralleling it with the Canadian situation, that Hall had a patent or maybe two down in Venezuela which had come to our attention, and that we understood our operations might infringe one or more of those pat-

(Deposition of Alfred M. Houghton.)

ents through the use of scratchers other than those bought from Hall, and in line with our policy in respect to Canada, we would, for the time being, respect the Venezuelan patent; and that we should possibly issue instructions to the field to buy scratchers only from Hall or Weatherford for use in Venezuela; and so far as I know those instructions went out, and so far as I know they have been respected. But we kept the reservation in mind. [46]

If anything happened to show us that the Wright Canadian patents were invalid or the Venezuelan patents were invalid, we would change our minds.

I have not finished my investigation with respect to the Venezuelan patents, and do not know what more I can do with respect to the Canadian patents until litigation, which I understand is going on up there, is settled. So, we are respecting patents extant, and have issued instructions accordingly.

Q. Where you furnished a copy of a letter that I wrote Mr. Vollmer, on September 12, 1951?

A. I have not checked the date. I think I know the letter to which you refer.

Yes, I have a copy of that letter.

Q. Did you ever give instructions to Mr. Vollmer about answering that letter?

A. Yes. I discussed the letter with him over the phone. I was very much peeved that you had written to Mr. Vollmer, and so told you when you were in the office a few days later or shortly thereafter; and Vollmer wanted to know how to answer the letter.

(Deposition of Alfred M. Houghton.)

I mulled over it, and I think I drafted an answer, which I later destroyed. I was perturbed by it because it seemed to be another one of these inquiries by outsiders as to our plans and policies, which were certainly [47] our business; and the letter appeared to ask, "Did you do so and so" and so forth and so on.

Apparently Mr. Hall had seen Vollmer previous to that, and had somehow or other gotten information about the instructions we were about to give or had given to the field in this regard, and this was sort of a check-up by you, and it didn't come directly through me, and I didn't like it.

Later on you were in the office, and we had not answered the letter by then, and I explained my position to you, and confirmed some of the facts in the letter, and then I advised Volmer, in view of that, no answer to the letter was necessary, and none was sent.

Q. To your knowledge, there has been no answer to date then?

A. To my knowledge there has been no answer. I don't think it calls for an answer. [48]

* * *

(Deposition of Alfred M. Houghton.)

Cross-Examination

By Mr. Lyon: [49]

* * *

Q. Who is Mr. Bohart to whom you have referred?

A. Mr. Bohart is, I believe, Vice President of one of the companies. I don't have much contact with him and, particularly, in connection with this matter.

Q. Do you know what company he is the Vice President of?

A. If you will let me refer to my pamphlet again, I think I can check it.

Q. Go right ahead.

A. I don't definitely remember. There is one other matter going through this office which is entirely irrelevant to this, which is in charge of one of my assistants, and I see Mr. Bohart's name on papers in connection with that. I don't deal directly with these people. [77]

Mr. Bohart is here listed as Vice President of Gulf Research & Development Company; he is Vice President of Gulf Oil Corporation, apparently located at Tulsa; he may be Vice President of some of the subsidiaries. Do you wish me to go through the whole book to see?

Mr. Scofield: See if he is an officer of Canadian Gulf?

The Witness: He is Vice President of Canadian Altapen Oil Company; he is Vice President of

(Deposition of Alfred M. Houghton.)

Canadian Basin Oil Company; he is Vice President of Canadian Northern Plains Oil Company; Vice President of Canadian Pacific River Oil Company; he is Vice President of Canadian Plains Oil Company; he is Vice President of Canadian Shield Oil Company, and so forth. I don't want to go through the whole book on the whole thing. [78]

* * *

Q. Is it not a fact, Mr. Houghton, that several days before my call on you—and by “several” I mean one, two or three days before—on July 19, that you had telephoned to me in Los Angeles and asked me concerning the new system of invoicing sent out by B. & W. which I had advised you of, and to which you raised an objection? [83]

A. Yes; it was shortly before that that I phoned you about that.

Q. And wasn't it true that on July 19th I told you I would discuss that matter with you in Washington at our conference on July 23, and also wanted to get some information from you concerning whom to see in Venezuela, that I would be coming through here on my way to Venezuela?

A. I think that was the substance of the conversation, yes.

* * *

Q. On July 23rd you also informed me, after I had assured you that the Gulf Company's purchasing of B. & W. scratchers on the invoice in question would not be construed as an admission by you or the Gulf Company of the validity of the

(Deposition of Alfred M. Houghton.)

Wright patents, that you would accept that method of invoicing?

A. I hardly ever make that kind of a definite statement until I have had a chance to consider it. I think probably what I said was that I would be inclined to advise that it be accepted. [84]

* * *

Q. Have you a copy of that letter of September 12, 1951? A. Yes, I do have.

Mr. Lyon: I will ask that that letter be marked for identification as Exhibit Z.

(The letter referred to was marked Defendant's Exhibit Z for identification.)

Q. (By Mr. Lyon): And you have stated that you had corresponded with Dr. Vollmer concerning that letter, Exhibit Z for identification. Is that correspondence here available?

* * *

Q. Dr. Vollmer sent you the letter of September 12, 1951, Exhibit Z. Did he send it with a letter of transmittal? A. What was the date of it?

Q. September 12. [88]

A. Yes, he sent it to me over the signature of Dr. Foote, with a letter of September 21, 1951.

Mr. Lyon: I will ask that the letter of September 21, 1951, be marked for identification as Defendants' Exhibit AA.

(Deposition of Alfred M. Houghton.)

The Witness: All right.

(The document referred to was marked Defendants' Exhibit AA, for identification.) [89]

* * *

Redirect Examination

By Mr. Scofield: [95]

* * *

Q. Did you contact the legal department of any of the Canadian Gulf Oil companies before the directive was issued by Mr.—— A. No.

Q. (Continuing): ——Bohart or by Mr. Foote to Mr. Bohart?

A. No, sir. I don't do that; I render my report to the executives, and the rest of it is a business proposition. They do as they are advised, not necessarily as I advise them, either.

Q. That directive was to the effect that only B. & W. scratchers were to be purchased in Canada, was it not? A. Yes, sir.

Q. Was it a coincidence that that directive was issued on the same day that you had your meeting with Wright and Lyon here in Washington? [98]

A. I have not checked it. I didn't know it was the same day, but if so, it was certainly a coincidence.

* * *

[Endorsed]: Filed December 10, 1951. [99]

United States District Court, Southern District
of California, Central Division
No. 7839—WM—Civil

JESSE E. HALL,

Plaintiff,

and

WEATHERFORD OIL TOOL CO., INC., et al.,

Plaintiff-Interveners,

vs.

KENNETH A. WRIGHT, et al.,

Defendants.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 761, inclusive, contain full, true and correct copies of complaint; Order to Show Cause Re Preliminary Injunction; Affidavit of Jessie E. Hall; Order Denying Motion for Temporary Injunction; Answer and Counterclaim of Defendants; Stipulation of Issues to Be Litigated at Trial; Plaintiff's Statement of Facts for Pretrial Hearing; Order on Defendants' Motion to Dismiss Counterclaim for Cancellation of Contract; First Amended Complaint; Answer of Defendants to Plaintiffs' First Amended Complaint; Reply to Defendants' Counterclaims; Supplemental Pleading to Plaintiffs' First Amended Complaint—Cancellation of Agreement; Order Granting Leave to File Supplemental Complaint; Defendants' Answer to

Supplemental Pleading to Plaintiffs' First Amended Complaint; Motion of Plaintiff for Summary Judgment; Defendants' Response to Plaintiff's Motion for Summary Judgment and Defendants' Counter Motion for Summary Judgment; Order on Motions for Summary Judgment; Notice of Motion for Leave to File Supplemental and Amended Pleading; Supplemental and Amended Answer of Defendants to Plaintiffs' Supplemental Pleading and Plaintiffs' First Amended Complaint and Counterclaim for Defendants; Minutes of the Court, Dated July 16, 1951; Plaintiffs' Reply to Supplemental and Amended Answer of Defendants to Plaintiff's Supplemental Pleading and Plaintiffs' First Amended Complaint and Counterclaim for Defendants; Order to Show Cause Why Temporary Injunction Should Not Be Issued Against Plaintiff; Affidavit of Kenneth A. Wright; Memorandum in Support of Order to Show Cause; Injunction; Motion for an Order Amending and Modifying the Order Dated January 25, 1952; Motion for Summary Judgment Finding of Facts Admitted or Without Substantial Controversy and Proposed Conclusions of Law; Memorandum and Opposition to Plaintiffs' Motion for Summary Judgment; Order on Motion for Summary Judgment; Order to Show Cause Why Temporary Injunction Should Not Be Issued Against Defendants; Affidavit of Thomas E. Scofield, Order Denying Plaintiffs' Application for Temporary Injunction; Answer to Amendment of Supplemental Answer of Defendants to Plaintiffs Supplemental Pleading and Plaintiffs' First Amended Complaint and Counter-Claim for Defend-

ants; Notice of Motion and Motion for Leave to Intervene; Second Amended Complaint (Exhibit A); Notice of Motion and Motion to Join Additional Defendants; Second Amended Complaint (Exhibit A); Memorandum in Opposition to Motion to Join Additional Defendants; Order on Motion of Plaintiff-Interveners to Join Additional Defendants; Second Amended Complaint; Answer of Defendants, Roland E. Smith, Adams-Campbell Co., and California Spring Co., Inc.; Answer and Counterclaims of defendants Kenneth A. Wright and B & W, Inc., to Second Amended Complaint; Order to Show Cause; Affidavit of Lewis E. Lyon; Stipulation; Notice of Motion and Motion to Strike From the Answer and Counterclaim of Defendants and Alternative Motion for More Definite Statement; Order Denying Application of Defendants for Temporary Injunction; Order Denying Plaintiffs' Motion to Strike, Etc.; Reply to Counterclaim of Defendants Wright and B & W; Stipulation and Order; Notice Under Title 35, U.S.C., 282; Stipulation; Plaintiffs' Charges of Unfair Competition Against Defendants and Proofs Thereon; Amendment to Second Amended Complaint and Supplemental Complaint; Supplemental Answer and Counterclaim; Reply to Supplemental Answer and Counterclaim; Memorandum of Decision; Findings of Fact and Conclusions of Law; Notice of Entry of Judgment; Judgment; Notice of Appeal, Plaintiff; Notice of Appeal, Defendants; Statement of Points on Appeal, Plaintiff; Designation of Record on Appeal, Plaintiffs; Designation of Record on Appeal, Defendants; together with the Original Plaintiff's

and Defendants' Exhibits; and copies of Reporters Transcript of Proceedings on May 25, 26, 1949; May 26, 27, 31, 1949; May 31, June 1, June 7, June 10, 1949; July 16, 1951; October 15, 1951; January 21, 1952; January 25, 1952; September 30, 1952; October 1, 1952; October 2, 1952; October 7, 1952; June 29, 1953; September 28, 1953; October 26, 1953; November 3, 1953; November 4, 1953; November 10, 1953; November 12, 1953; November 17, 1953; November 18, 1953; November 19, 1953; November 23, 1953; November 24, 1953; November 25, 1953; November 25, 1953; November 25, 1953; November 25, 1953; November 25, 1953; November 25, 1953; November 30, 1953; December 1, 1953; December 2, 1953; December 3, 1953; December 8, 1953; December 9, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; December 10, 1953; January 19, 1954; January 20, 1954; January 21, 1954; January 25, 1954, January 26, 1954; January 27, 1954; January 28, 1954; January 29, 1954; February 1, 1954; February 2, 1954; February 3, 1954; February 3, 1954; February 4, 1954; March 16, 1954; March 16, 1954; March 17, 1954; March 18, 1954; March 19, 1954; transmitted herewith, constitute the Record on Appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing

record amount to \$4.00, which has been paid by the Appellant, Jesse E. Hall, Plaintiff.

Witness my hand and the seal of said District Court this 10th day of January, A.D. 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,626. United States Court of Appeals for the Ninth Circuit. Jesse E. Hall, Weatherford Oil Tool Company, Inc., a Corporation; Weatherford Spring Company of Venezuela, C.A., a Corporation; Hall Development Company, C.A., a Corporation; Weatherford, Ltd., a Corporation; Weatherford Internacional, S.A., De C.V., a Corporation; Nevada Leasehold Corporation, a Corporation; Barker Industrial Products, Inc., a Corporation, Appellants, vs. Kenneth A. Wright and B & W, Inc., a Corporation, Appellees. Kenneth A. Wright and B & W, Inc., a Corporation, Appellants, vs. Jesse E. Hall, Weatherford Oil Tool Company, Inc., a Corporation, et al., Appellees. Transcript of Record. In Sixty-Four Volumes, Vol. I. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed January 18, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the U. S. Circuit Court of Appeals
for the Ninth Circuit

No. 14,626

JESSE E. HALL

and

WEATHERFORD OIL TOOL COMPANY, INC.,
a Texas Corporation; WEATHERFORD
SPRING COMPANY OF VENEZUELA, C.A.,
a Venezuelan Corporation; HALL DEVELOP-
MENT COMPANY, C.A., a Venezuelan Corpo-
ration; WEATHERFORD, LTD., a Corporation
of the Province of Alberta, Canada; WEATH-
ERFORD INTERNACIONAL, S.A. DE C.V.,
a Corporation of Mexico; NEVADA LEASE-
HOLD CORPORATION, a Nevada Corpora-
tion; PARKER INDUSTRIAL PRODUCTS,
INC., a Texas Corporation,

Appellants and Cross-Appellees,

vs.

KENNETH A. WRIGHT

and

B & W, INC., a California Corporation,

Appellees and Cross-Appellants.

APPELLANTS' POINTS ON APPEAL
UNDER RULE 17(6)

The Appellants do hereby adopt the Designation
of the Contents of the Record and Statement of

Points Relied Upon by Appellants on Appeal filed by Plaintiff and Plaintiff-Interveners (Appellants herein) in the U. S. District Court for the Southern District of California, Central Division, on December 15, 1954, as the statement of points upon which Appellants intend to rely in their appeal and a designation of the record material to the consideration of the appeal under the provisions of Rule 17(6) of the Rules of the United States Court of Appeals for the Ninth Circuit.

A copy of the said Designation of the Record and of the said Statement of Points as filed in the U. S. District Court is hereto attached.

Respectfully submitted,

/s/ THOMAS E. SCOFIELD,

/s/ PHILIP SUBKOW,

Attorneys for Appellants.

[Endorsed]: Filed January 25, 1955.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,626

JESSE E. HALL, WEATHERFORD OIL TOOL COMPANY, INC., a Texas Corporation; WEATHERFORD SPRING COMPANY OF VENEZUELA, C.A., a Venezuelan Corporation; HALL DEVELOPMENT COMPANY, C.A., a Venezuelan Corporation; WEATHERFORD, LTD., a Corporation of the Province of Alberta, Canada; WEATHERFORD INTERNACIONAL, S.A. de C.V., a Corporation of Mexico; NEVADA LEASEHOLD CORPORATION, a Nevada Corporation; PARKER INDUSTRIAL PRODUCTS, INC., a Texas Corporation,

Appellants and Cross-Appellees,

vs.

KENNETH A. WRIGHT, and B & W, INC., a California Corporation,

Appellees and Cross-Appellants.

STATEMENT OF POINTS ON APPEAL

Pursuant to the provisions of Rule 17(6), Kenneth A. Wright and B & W, Inc., Cross-Appellants and Appellees, state they will rely upon the hereinafter set forth points.

1.

The District Court erred in dismissing the coun-

terclaim of defendant-counterclaimants*. (Judgment, Paragraph VI.)

2.

The District Court erred in finding and holding that the defendant-counterclaimants were in court with unclean hands. (Finding XXVI, Conclusion of Law B.)

2-A.

The District Court erred in denying relief to defendants and defendant-counterclaimants upon the ground that defendants and defendants-counterclaimants (a) come into court with unclean hands, and that (b) during the continuance of the controversy did not maintain their hands clean. (Conclusion of Law B.)

3.

The District Court erred in finding and in adjudging Letters Patent No. 2,338,372 granted January 4, 1944, to be invalid and void as to each and every claim thereof. (Finding XXX, Judgment, paragraph 10.)

4.

The District Court erred in finding and in adjudging Letters Patent No. 2,374,317 granted April 24, 1945, to be invalid and void as to each and every claim thereof. (Finding XXXIV, Judgment, paragraph 12.)

*Because of the Appeal and Cross-Appeal, in order to avoid confusion, Appellees Cross-Appellants will refer to the parties by their designation as used in the District Court.

5.

The District Court erred in finding and in adjudging Letters Patent No. 2,392,352 granted January 8, 1946, to be invalid and void as to each and every claim thereof. (Finding XXXV, Judgment, paragraph 14.)

6.

The District Court erred in failing to find that plaintiff, Hall, and plaintiff-interveners, have infringed Letters Patent No. 2,338,372. (No Finding or Conclusion.)

7.

The District Court erred in failing to find that plaintiff, Hall, and plaintiff-interveners, have infringed Letters Patent No. 2,374,317. (No Finding or Conclusion.)

8.

The District Court erred in failing to find that plaintiff, Hall, and plaintiff-interveners, have infringed Letters Patent No. 2,392,352. (No Finding or Conclusion.)

9.

The District Court erred in finding and in basing any holding or judgment upon the finding that Letters Patent No. 2,338,372 do not teach, claim or mention a method of completion of oil wells which incorporated within its teachings and claims cementing operations performed incident to oil well completions. (Finding XV.)

10.

The District Court erred in finding that and in

basing any holding against defendants and defendant-counterclaimants upon the finding that defendants, Wright and B & W, Inc., both before and during the pendency of this litigation have unfairly and without cause notified customers and prospective customers of plaintiff and plaintiff-intervenors that the customers infringed Wright's method Patent No. 2,338,372 by the use of scratchers in cementing operations incident to the completion of oil wells without intent that the notices serve as a preliminary to suit. (Finding XIV.)

11.

The District Court erred in finding and in basing any holding against defendants and defendant-counterclaimants upon the finding that defendants and defendant-counterclaimants, Wright and B & W, Inc., “* * * opposed the grant of said patent to Hall (2,671,515) at every permissible stage and by every permissible proceeding in the United States Patent Office.” (Findings X and Xa.)

12.

The District Court erred in finding that and in basing any holding against defendants and defendant counterclaimants upon the finding that notices given by Wright and B & W, Inc., to the trade were not in good faith because Letters Patent No. 2,338,372 does not teach, claim or even mention a method of carrying out the cementing operations incident to the completion of an oil well. (Finding XV.)

13.

The District Court erred in finding and in basing a holding against defendants and defendant-counterclaimants upon the finding that the “* * * threats and notices of infringement of said method patent No. 2,338,372 were given by defendants and counterclaimants to customers of plaintiff and plaintiff-interveners in order to establish a limited monopoly in the manufacture and sale of scratchers not covered by said Letters Patent No. 2,338,372.” (Finding XVa.)

14.

The District Court erred in finding that and in basing any holding against defendants and defendant-counterclaimants upon the finding that during the pendency of this litigation the said defendants and defendant-counterclaimants have unfairly and without cause notified customers of plaintiff and plaintiff-interveners that the customers infringed the Wright Patent No. 2,374,317, and that the said notices given to the trade both directly and indirectly were without intent that the notices serve as a preliminary to suit.

15.

The District Court erred in finding that and in basing any holding upon the finding that the notices of infringement of Letters Patent No. 2,374,317 given by defendants and defendant-counterclaimants were given in order to establish a limited monopoly in the manufacture and sale of scratchers not covered by said Letters Patent No. 2,374,317. (Finding XVc.)

16.

The District Court erred in finding that and in basing any holding or judgment against defendants and defendant-counterclaimants upon the finding that defendants and defendant-counterclaimants, Wright and B & W, Inc., caused Scratchers, Inc., to be organized; caused Scratchers, Inc., to acquire title to the Black & Stroble Patent No. 2,151,416, and caused suits to be filed against Weatherford Oil Tool Company, Inc., plaintiff-intervener; S & R Tool Company, and Weatherford Oil Tool Company, Inc., and in “* * * attacking the Hall Mexican Patent No. 47,661.” (Findings XVI and XVII.)

17.

The District Court erred in finding that the suits brought by Scratchers, Inc., and set forth in Finding of Fact XVI “* * * were instituted to serve as a basis for sales propaganda to the trade in the state or country in which they were filed.” (Finding XXIII.)

18.

The District Court erred in finding that defendants and defendant-counterclaimants have employed, and practiced techniques to influence the placing of business by the larger oil companies, which techniques entailed everything from veiled threats to adroit suggestions in an effort to make the oil companies feel more secure, patent-infringement wise, if they would direct their business to defendants and defendant-counterclaimants. (Finding XXIV.)

19.

The District Court erred in finding and in basing any holding against defendants and defendant-counterclaimants upon the finding that any suit, action or proceeding instituted by defendants or defendant-counterclaimants in this country or in any other country were tried primarily to the trade while pretending to look to this court for justice. (Finding XXV.)

20.

The District Court erred in finding that defendants and defendant-counterclaimants have, during this litigation, resorted to self-help while pretending to look to the court for justice. (Finding XXVa.)

21.

The District Court erred in denying relief to defendants upon the ground that during pendency of the action that the defendants and defendant-counterclaimants have resorted to self-help. (Conclusion of Law C.)

22.

The District Court erred in its conclusion that it failed to allow the defendants and defendant-counterclaimants their taxable costs occasioned in this action. (Conclusion of Law E.)

23.

The District Court erred in failing to specifically find that plaintiff, Hall, had knowingly misrepresented facts to the Patent Office and had by such

means misled the Patent Office in the granting of the Hall Patent No. 2,671,515.

24.

The District Court erred in failing to specifically find that the action of plaintiff, Hall, before the United States Patent Office fell strictly within the holding of *Precision Instruments Co. v. Automotive Co.*, 324 U. S. 806, and in failing to apply against Hall the admonitions of the Supreme Court as set forth in such decision.

25.

The District Court erred in failing to hold that the Hall application, Serial No. 556,191, eventuated in Letters Patent No. 2,671,515, was not a legal continuation-in-part of Hall application, Serial No. 388,891.

26.

The District Court erred in failing to find that Letters Patent No. 2,671,515 was invalid and void because the application therefor was filed more than a year after the devices illustrated in said application were on sale, had been sold and had been shown in public print for more than a year prior to the filing of the application for said Letters Patent.

27.

The District Court erred in failing to find the party Hall was guilty of unfair practice when he filed applications for Letters Patent in foreign countries which were knowingly filed contrary to the provisions of the laws of such foreign countries for

the sole purpose of and as a means of illegally interfering with the sale and distribution of scratchers of defendants and defendant-counterclaimants.

KENNETH A. WRIGHT,

B & W, INC.,

Appellees and Cross-Appel-
lants.

LYON & LYON,

By /s/ LEWIS E. LYON.

Receipt of copy acknowledged.

[Endorsed]: Filed March 12, 1955.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,626

JESSE E. HALL, WEATHERFORD OIL TOOL COMPANY, INC., a Texas Corporation; WEATHERFORD SPRING COMPANY OF VENEZUELA, C.A., a Venezuelan Corporation; HALL DEVELOPMENT COMPANY, C.A., a Venezuelan Corporation; WEATHERFORD, LTD., a Corporation of the Province of Alberta, Canada; WEATHERFORD INTERNATIONAL, S.A., de C.V., a Corporation of Mexico; NEVADA LEASEHOLD CORPORATION, a Nevada Corporation; PARKER INDUSTRIAL PRODUCTS, INC., a Texas Corporation,

Appellants and Cross-Appellees,

vs.

KENNETH A. WRIGHT and B & W, INC., a California Corporation,

Appellees and Cross-Appellants.

STIPULATION RELATIVE TO EXHIBITS

It appearing that because of the number and volume of documentary exhibits designated herein by appellants-cross-appellees and appellees-cross-appellants, that the cost of printing and reproduc-

ing the exhibits would be extremely high, and the parties having agreed together as to certain of the said exhibits which are to be reproduced as set forth in the schedules hereto annexed, It Is Hereby Stipulated and Ordered that all the exhibits designated by the parties to this appeal other than those specifically set forth in the schedules hereto annexed shall be included in the record on appeal and considered in their original form as introduced in evidence at the trial without reproduction.

That the exhibits appearing in the schedules hereto attached and which are respectively marked "Schedule A, Exhibits designated by Appellants and Cross-Appellees"; "Schedule A-1, Exhibits designated by Appellants and Cross-Appellees to be supplied by Appellants and Cross-Appellees"; "Schedule B, Exhibits designated by Appellees and Cross-Appellants"; "Schedule B-1, Exhibits designated by Appellees and Cross-Appellants to be supplied by Appellees and Cross-Appellants" be reproduced in the following manner:

That as to both Schedules A and B hereto, that the Clerk of this Honorable Court may prepare seven copies of the said exhibits listed in said Schedules A and B, and that appellants-cross-appellees and appellees-cross-appellants shall provide to the clerk for inclusion in the record seven copies of the schedules listed in their said Schedules A-1 and B-1. That the seven copies of the exhibits thus designated shall be included in the record, five

copies to be retained by the Court and one copy for appellants-cross-appellees and one copy for appellees-cross-appellants.

/s/ THOMAS E. SCOFIELD, P.S.,

/s/ PHILIP SUBKOW,

Attorneys for Appellants and
Cross-Appellees.

LYON & LYON,

By /s/ LEWIS E. LYON,

Attorneys for Appellees and
Cross-Appellants.

SCHEDULE A

Exhibits designated by Appellants and Cross-Appellees and to be included in folio:

Exhibits 34, 35, 37, 38, 39, 41, 81, 88-A, 119, 120, 171, 182, 193, 216, 216-A, 222, 223, 224, 225, 226, 227, 229, 234, 248, 249, 250, 272-B, 278, 280-A, 285, 286, Q-1, Q-2.

SCHEDULE A-1

Exhibits designated by Appellants and Cross-Appellees to be supplied by Appellants and Cross-Appellees:

Exhibits: 37, 38, 88-A, 222, 223, 224, 225, 226, 227, 229, 234, 272-B, 286, Q-1, Q-2.

SCHEDULE B

Exhibits designated by Appellees and Cross-Appellants and to be included in folio: (Defendant)

Exhibits A, B, V, W, X, DD, SS, VV, XX, YY, ZZ, AAA, BBB, DDD, EEE, HHH, III, JJJ, KKK, LLL, MMM, NNN, OOO, QQQ, SSS, WWW, XXX, YYY, ZZZ, AAAA, HHHH, AG, AI, BJ, BN, BQ, BR, BS, BU, BU-1, BV, (or Exhibit 152, the same exhibit having been marked Plaintiff's Exhibit 152), BW, BX, BY, CQ, CT, CX-1, CZ, DS, DV, DV-1, EY, EZ, FE; and Plaintiff's Exhibits 1, 4, 14, 45, 64, 67, 83, 231, 232, 233.

SCHEDULE B-1

Exhibits designated by Appellees and Cross-Appellants to be supplied by Appellees and Cross-Appellants:

Exhibits HH, NN, NNNN-21-b, NNNN-23-b, NNNN-24-a, AP-10, AP-11, AU-1, AU-2, AS-1, AS-2, AS-7, BD, BE, BK.

Receipt of copy acknowledged.

[Endorsed]: Filed April 15, 1955.

No. 14648

**United States
Court of Appeals**
for the Ninth Circuit

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Business as PACIFIC SOUTHWEST AIRLINES,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 96)

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

FILED

APR 29 1955

No. 14648

**United States
Court of Appeals**
for the Ninth Circuit

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

Civil No. 16754-HW

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Busi-
ness as PACIFIC SOUTHWEST AIRLINES,

Defendant.

COMPLAINT FOR INJUNCTION

The plaintiff, the Civil Aeronautics Board, hereinafter sometimes referred to as the Board, by its attorneys, complaining of the defendant, alleges as follows:

1. The jurisdiction of this Court is based upon section 1007 of the Civil Aeronautics Act of 1938, as amended (52 Stat. 1025, 49 U.S.C. 647).

2. The plaintiff is the Federal regulatory agency created by the Civil Aeronautics Act of 1938, as amended (Act of June 23, 1938, Ch. 601, 52 Stat. 997; Reorg. Plan No. IV, Section 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235, 49 U.S.C. 401, et seq., hereinafter sometimes referred to as the Act), charged with the responsibility for the regulation of air transportation and the performance of certain duties [2*] prescribed in said Act, including

*Page numbering appearing at foot of page of original Certified Transcript of Record.

the issuance to air carriers of certificates of public convenience and necessity and other authority to engage in air transportation, and causing to be instituted appropriate proceedings for the enforcement of the provisions of such Act against air carriers engaging in air transportation without authority therefor from the plaintiff.

3. The defendant, a citizen of the United States, was at all times herein mentioned and now is a corporation organized and existing under the laws of the State of Nevada, having its principal offices and carrying on business within the Southern District of California at Lockheed Air Terminal, Burbank, California.

4. Section 1(2) of the Civil Aeronautics Act (52 Stat. 977, 49 U.S.C. 401(2)) defines the term "air carrier" as used therein to mean any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. The term "air transportation" is in turn defined by sections 1(10) and 1(21) of the Act (52 Stat. 977, 49 U.S.C. 401(10) and (21)). The terms "air carrier," "air transportation" and "interstate air transportation," wherever they appear herein, are used in the sense defined by the said sections 1(2), 1(10) and 1(21) of the Act.

5. The Civil Aeronautics Act, particularly section 401(a) thereof (52 Stat. 987, 49 U.S.C. 481(a)), prohibits any air carrier from engaging in air

transportation unless there is in force a certificate of public convenience and necessity or other authority issued by the plaintiff authorizing such air carrier to engage in air transportation. Section 416(b) of the Act (52 Stat. 1004, 49 U.S.C. 496(b)) empowers the plaintiff, under certain conditions, to exempt air carriers from the necessity of compliance with certain provisions of the Act, including the requirements of section 401(a) thereof.

6. Since 1949 and to the date hereof, the defendant has been engaged in the operation of flights of aircraft between various places in the State of California, including San Diego, Burbank, San Francisco [3] and Oakland on which flights it has been and is carrying passengers as a common carrier for compensation and hire. The defendant does not have a certificate of public convenience and necessity, an exemption under section 416(b) of the Act (52 Stat. 1004, 49 U.S.C. 496(b)), or any other authority from the plaintiff authorizing it to engage in air transportation.

7. Beginning prior to September 1, 1953, and continuing to the date hereof, defendant has carried on the flights operated by it between points within the State of California, a substantial number of persons the origination or destination of whose journeys have been places outside the State of California.

8. By reason of the activities and practices described in paragraph 7 hereto, the defendant has

engaged in interstate air transportation as an air carrier within the meaning of the Act. Since the defendant has not been issued a certificate of public convenience and necessity or other authority authorizing it to engage in such air transportation, the defendant has thereby violated section 401(a) of the Act.

9. The plaintiff is informed and believes and, therefore, alleges that the defendant will persist in the activities and practices hereinbefore described, and unless it is promptly restrained and enjoined as hereinafter prayed, it will continue to commit the aforesaid violations of the said Act.

10. A judgment by the Court enjoining and restraining the violations hereinabove alleged is authorized by section 1007 of the Act, upon application of this plaintiff.

Wherefore, the plaintiff demands judgment as follows:

(a) That the defendant and its officers, agents, employees and representatives and each of them be enjoined during the pendency of this action and permanently:

(1) From engaging in air transportation in violation of section 401(a) of the Civil Aeronautics Act of 1938, as amended; and

(2) From transporting on its flights any person for [4] compensation or hire whose transporta-

tion originates or terminates at a place outside of the State of California.

(b) That the plaintiff be granted such other and further relief as the Court may deem necessary and appropriate.

/s/ STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ and
ANDREW J. WEISZ,
Assistants United States
Attorney;

By /s/ ANDREW J. WEISZ,
Assistant United States
Attorney;

/s/ JAMES E. KILDAY,

/s/ ALBERT PARKER,
Special Assistants to the
Attorney General;

/s/ JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics
Board, Attorneys for the Plaintiff.

Duly verified.

[Endorsed]: Filed May 6, 1954. [5]

[Title of District Court and Cause.]

ANSWER

Defendant Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, hereinafter sometimes referred to as Pacific Southwest Airlines, in answer to the complaint for injunction, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraph 2 with respect to the status and authority of plaintiff only insofar as the same relates to air transportation as defined in the Civil Aeronautics Act of 1938, as amended, to wit:

“Interstate air transportation,” “overseas air transportation,” and “foreign air transportation,” respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage [7] of mail by aircraft, in commerce between, respectively:

(a) A place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) A place in any State of the United States, or the District of Columbia, and any place in a

Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) A place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

II.

Denies the allegations of Paragraph 3 except that defendant admits that it is a citizen of the United States; defendant alleges that at all times mentioned in said complaint and at present it is a corporation organized and existing under the laws of the State of California, having its principal office and place of business at Lindbergh Field, San Diego, California. [8]

III.

Admits the allegations of Paragraph 6 and further alleges that it has been issued a Commercial Operator's Certificate by the United States of America, Department of Commerce, Civil Aeronautics Administration, which said certificate authorizes defendant to operate as "a commercial operator and to conduct common carrier operations carrying passengers intrastate on a scheduled basis" in accordance with the provisions of the Civil Aeronautics Act of 1938, as amended, and in accordance with the further provisions of said Commercial Operator's Certificate.

IV.

Denies the allegations of Paragraph 7 and further alleges that it has not and does not now carry mail by aircraft or carry property as a common carrier for compensation.

V.

Denies each and every allegation of Paragraph 8.

VI.

Denies each and every allegation of Paragraph 9.

VII.

Denies the allegation of Paragraph 10.

Wherefore, defendant prays the relief requested by plaintiff herein be denied and that the said complaint be dismissed.

For a first and separate defense defendant alleges:

I.

The complaint herein fails to state a claim against defendant upon which relief can be granted.

MESERVE, MUMPER &
HUGHES,

By /s/ LEWIS T. GARDINER,
Attorneys for Friedkin Aeronautics, Inc., d/b/a
Pacific Southwest Airlines.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed July 12, 1954. [9]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the annexed affidavits of John F. Wright, John B. Flynn, Joseph W. Stout, Jr., Robert F. Rickey and John W. Chambers, and upon the verified complaint filed herein it is hereby:

Ordered, that the defendant in the above-entitled action, Friedkin Aeronautics, Inc., d/b/a Pacific Southwest Airlines, appear on the 17 day of May, 1954, at 10 o'clock a.m. of that day, or as soon thereafter as counsel may be heard, at Room 5, United States Court House and Post Office Building, Temple and Spring Streets, in the City of Los Angeles, California, and show cause why an injunction during the pendency of this action should not be issued as prayed for in the said complaint.

It Is Further Ordered: [12]

That the service of a copy of the Order to Show Cause and annexed affidavits, together with a copy of the aforesaid complaint of the Civil Aeronautics Board upon the defendant be made on or before the 10 day of May, 1954, and that such service be deemed sufficient service hereof.

Dated: Los Angeles, California, May 6, 1954.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed May 6, 1954. [13]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

John F. Wright being first duly sworn deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as a Compliance Attorney.

2. This is an action seeking an injunction restraining the defendant from violating section 401(a) of the Civil Aeronautics Act of 1938, as amended.

3. Jurisdiction to entertain this action is conferred upon this court by section 1007(a) of said Act.

4. The complaint charges that the defendant has engaged, and is engaging, in air transportation of persons without authority from the Civil Aeronautics Board and thereby, is violating section 401(a) of the Act. [14]

5. The verified complaint and affidavits submitted herewith show that despite the fact that the defendant has no such authority therefor, it has been and is regularly engaged in the carriage for compensation or hire of interstate passengers traveling both east and west transcontinentally by carrying such persons on its flights between Bur-

bank and San Diego and Oakland and San Francisco, California.

6. The defendant has committed the aforesaid violations for a substantial period of time. Unless promptly restrained, the defendant may be expected, on the basis of its past conduct and operations, to continue the activities complained of, and affiant is informed and believes that defendant intends to continue such activities.

7. In the light of the facts set forth in the complaint, affidavits and exhibits, the public cannot immediately and adequately be protected against the violations complained of except through the interlocutory relief prayed for in said complaint.

8. No previous application for the relief demanded herein has been made.

/s/ JOHN F. WRIGHT.

Subscribed and sworn to before me this 29th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public.

My commission expires 1-14-58. [15]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

Joseph W. Stout, Jr., being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. On various occasions during the period between September 6, 1953, and October 22, 1953, affiant personally conducted an investigation to ascertain the facts as to the transportation of interstate passengers by Pacific Southwest Airlines.

3. On September 6, 1953, affiant visited the International Terminal at Washington, D. C., to inspect a representative flight of Skycoach Airlines Agency, Inc., a ticket agent for several air carriers registered with the Board as Large Irregular Carriers, including Currey Air Transport, Ltd., and Great Lakes Airlines, Inc. These air carriers are engaged in the interstate air transportation of passengers between New York, New York; Washington, D. C.; Chicago, Illinois, and other intermediate points, and Burbank, San Diego and Oakland, California. Affiant interviewed Mr. Cliff Stern, the agent on duty, and was advised that Skycoach holds out to the public and provides a daily service from Washington, D. C., to Chicago,

Kansas City, Burbank, San Diego, and Oakland, departing Washington at 8:30 p.m.; that the flight terminates at Burbank; and that the passengers destined for Oakland and San Diego are transported from Burbank to these points on Pacific Southwest.

4. On the same visit at the International Terminal, Washington, D. C., [16] affiant also observed a representative flight of North American Airlines Agency. North American sells transportation on, and arranges flights for, a number of air carriers registered with the Civil Aeronautics Board as Large Irregular Carriers, including Hemisphere Air Transport, Trans American Airways, Inc.; Trans National Airlines, Inc.; Twentieth Century Airlines, Inc., and Unit Export Company, Inc. These carriers engage in the interstate air transportation of persons between New York and Chicago, and New York, Washington, D. C., and Dallas, Texas, and other intermediate points, on the one hand, and Burbank, San Diego, and Oakland, on the other hand. Affiant interviewed Mr. David Stanley, the North American clerk on duty, and was advised that North American holds out to the public and provides a daily flight from Washington, D. C., to Dallas, Burbank, San Diego, and Oakland, departing Washington at 7:30 p.m.; that the flight terminates at Burbank; and that "North American has a deal with Pacific Southwest Airlines to carry the Oakland and San Diego passengers from Burbank."

5. During the period between September 22 and October 22, 1953, affiant conducted his investigation of the activities of Pacific Southwest in Los Angeles and Burbank. His investigation disclosed that the air carriers represented by Skycoach and North American and U. S. Aircoach, another Large Irregular Carrier, have been using Pacific Southwest to provide onward transportation from Burbank for their San Diego and Oakland passengers; and that the service of Pacific Southwest has been similarly available to, and used by, other Large Irregular Carriers operating into Burbank.

6. On October 1, 1953, affiant visited the offices of U. S. Aircoach at Lockheed Air Terminal, Burbank, interviewed Mr. Fritz Hutcheson, the President of U. S. Aircoach, with respect to the transfer of U. S. Aircoach interstate passengers to Pacific Southwest for onward transportation to San Diego and Oakland.

Mr. Hutcheson stated that U. S. Aircoach consistently uses Pacific Southwest to transfer passengers continuing beyond Burbank to San Diego or [17] Oakland. He explained that most of the transfers were for passengers destined to San Diego, because U. S. Aircoach usually operates its own shuttle flight to Oakland, but that occasionally U. S. Aircoach does transfer Oakland passengers to Pacific Southwest, as, for example, on September 18, 1953, when U. S. Aircoach transferred 16 passengers to Pacific Southwest flight 11, which represented 57 per cent of the space available on that

flight, since the capacity of the Pacific Southwest aircraft was 28.

Mr. Hutcheson explained that the procedure for transferring the interstate passengers from U. S. Aircoach to Pacific Southwest at Burbank was as follows: U. S. Aircoach prepares a transfer passenger manifest which lists the names of all passengers to be transferred from U. S. Aircoach to Pacific Southwest. No invoices are used as U. S. Aircoach always makes payment to Pacific Southwest on the basis of the transfer manifest which is delivered to the Pacific Southwest ticket counter. After receipt of the transfer manifest, Pacific Southwest prepares its exchange order showing the number of passengers and the fare due from U. S. Aircoach. U. S. Aircoach is allowed a commission for each passenger transferred to Pacific Southwest which reduces the net fare paid by U. S. Aircoach on each passenger transferred. As the transportation tax is collected from the passengers for transportation from the point of origination outside of California through to the final destination in California, Pacific Southwest does not collect any transportation tax on the passenger from the point of transfer (Burbank) to the final destination in California. A tax certification form is signed by the delivering carrier (U. S. Aircoach) signifying that this tax has already been collected. This protects Pacific Southwest from any liability in connection with the tax on the continuing part of the

trip from Burbank to San Diego or Oakland. This form refers to the delivering carrier (U. S. Aircoach) as the primary carrier and to Pacific Southwest as the sub-hauler. A copy of this form, supplied by Mr. Hutcheson, is attached as Exhibit 1.

Affiant's examination of U. S. Aircoach's records for the period between August 14 and September 28, 1953, including original passenger [18] manifests, transfer manifests, flight tickets, Pacific Southwest exchange orders, and payment checks to Pacific Southwest Airlines, discloses the following with respect to the transfer of interstate passengers at Burbank from U. S. Aircoach to Pacific Southwest.

U. S. Aircoach Flight No.	Arrival Date At Burbank 1953	No. Persons Transferred	Date of Transfer	Pacific Southwest Flight No.	Destination
1. 814W	August 15	1	August 15	90	San Diego
2. 818W	August 19	2	August 19	90	San Diego
3. 818W	August 19	4	August 19	11	Oakland
4. 824W	August 25	8	August 25	90	San Diego
5. 824W	August 25	22	August 25	11	Oakland
6. 828W	August 29	1	August 29	90	San Diego
7. 906W	Sept. 7	2	Sept. 7	90	San Diego
8. 909W	Sept. 10	1	Sept. 10	12	San Diego
9. 913W	Sept. 14	1	Sept. 14	90	San Diego
10. 913W	Sept. 14	3	Sept. 14	11	Oakland
11. 917W	Sept. 18	16	Sept. 18	11	Oakland
12. 917W	Sept. 18	4	Sept. 18	10	San Diego
13. 923W	Sept. 24	3	Sept. 24	90	San Diego
14. 923W	Sept. 24	5	Sept. 24	81	Oakland
15. 927W	Sept. 28	2	Sept. 28	90	San Diego

Affiant made photostatic copies of the documents with respect to several representative flights involving transfers of interstate passengers at Burbank from U. S. Aircoach to Pacific Southwest.

These documents are attached hereto as Exhibits 2 through 7. Each of these exhibits consists of (1) the passenger manifest of the U. S. Aircoach flight on which the passengers were transported from points outside the State of California to Burbank; (2) the flight coupons of tickets purchased by passengers for their flights from such points outside the State of California to their ultimate destination in the State of California; (3) the transfer manifest for the continuing transportation on Pacific Southwest of the passengers from Burbank to their final destination in California, and (4) [19] the Pacific Southwest exchange order purchased by U. S. Aircoach from Pacific Southwest to provide the continuing transportation of the passengers.

For example, the documents comprising Exhibit 2 establish that 12 passengers who were flown from Burbank to Oakland on Pacific Southwest Flight 11 on August 25, 1953, were transported to Burbank from various points outside of California on U. S. Aircoach Flight 824W. Thus, Exhibits 2(a) and 2(b) are passenger manifests showing that passengers Cate, Kneeland, Thompson, Heebnel, Moran, Horton, Flannery, and Hope were transported from New York to Burbank on U. S. Aircoach Flight 824W, which departed New York on August 24, 1953. Exhibit 2(c) is a passenger manifest showing that passengers Boyle and Torries were transported from Philadelphia to Burbank on U. S. Aircoach Flight 824W, which departed Philadelphia the same day. Exhibit 2(d) is a passenger manifest

showing that passengers Williams and Hand were transported from Chicago to Burbank on U. S. Aircoach Flight 824W, also departing Chicago the same day. Copies of the U. S. Aircoach flight coupons for these 12 passengers are included in Exhibits 2(a) through 2(d). These show that the passengers were issued tickets covering their transportation from their points of origin on U. S. Aircoach Flight 824W to Oakland, their final destination. Upon arrival of U. S. Aircoach Flight 824W at Burbank, these passengers were transferred to Pacific Southwest Airlines Flight 11 of August 25, 1953, for their continuing transportation to Oakland as shown by Exhibit 2(e) which includes a copy of the transfer manifest of U. S. Aircoach and the Pacific Southwest Exchange Order purchased by U. S. Aircoach for the continuing transportation of these 12 passengers from Burbank to Oakland by Pacific Southwest. A penciled notation at the top of the Exchange Order shows that U. S. Aircoach made payment to Pacific Southwest for the transportation of these 12 passengers by Check number 2660 on August 25, 1953.

7. On October 1, 1953, affiant visited the office of North American at Lockheed Air Terminal, Burbank, and interviewed Mr. Jack Wootton, the agent in charge, with respect to the transfer of interstate passengers by [20] North American to Pacific Southwest.

Mr. Wootton stated that North American operates its own shuttle flights between Burbank and

Oakland and Burbank and San Diego if aircraft is available and there is a sufficient passenger load; otherwise, the Oakland and San Diego passengers are transferred to either Pacific Southwest or California Central Airlines.

The procedure for transferring interstate passengers from North American to Pacific Southwest as explained by Mr. Wootton, is as follows: Normally, North American has two inbound flights arriving in Burbank at about 9 a.m. These are Flight 600, which arrives from New York via Dallas, and Flight 201, which arrives from New York via Chicago. North American, in advance of the flight arrivals, prepares an Operation Advisory Sheet, Form M 9. This shows what provisions are to be made for passengers continuing from Burbank to other points in California. If North American has a sufficient passenger load and aircraft available, the San Diego and Oakland flights will be shown together with the N C members of the aircraft scheduled for the operation of these flights. Otherwise, if the continuing flights are not to be operated, the advisory sheet will note that the continuing passengers are to be off-spaced. In that event, Mr. Wootton checks with both California Central Airlines and Pacific Southwest to see what flights they have available and to determine whether they have sufficient space to accommodate the continuing North American passengers. If the flight and space are available, Mr. Wootton then blocks off a number

of seats equivalent to the number of continuing passengers on whichever carrier can accommodate them. Usually the North American stewardess prepares the transfer manifest for the passengers on her flight prior to arrival in Burbank. However, sometimes this manifest is not made up by the stewardess and Mr. Wootton then prepares it after the arrival of the flight. When the passengers check in at the North American ticket counter he examines the passengers' incoming flight tickets. If the ticket is for a one-way trip, Mr. Wootton validates the passenger receipt coupon with a North American Stamp, returns this to the passenger, and instructs him to check [21] in at the Pacific Southwest or California Central ticket counter. If the passenger holds a round-trip ticket which contains a return flight coupon, Mr. Wootton prepares a North American exchange order which is given to the passenger. The passenger then checks with Pacific Southwest or California Central, as the case may be, and submits the validated passenger receipt or exchange order covering his continuing transportation in California.

Affiant examined the records of North American for August and September, 1953, and found numerous instances of westbound transeontinental flights involving transfers of passengers at Burbank from the North American carriers to Pacific Southwest for onward transportation to San Diego and Oakland. Affiant made photostatic copies of the documents with respect to several flights. These

documents are attached hereto as Exhibits 8 through 10 and show the following:

(1) Exhibit 8 includes the passenger manifests of North American Flight 201 which list the name of 2 passengers from New York (LaGuardia Airport) and 4 passengers from Chicago who departed from these cities for Burbank on September 21, 1953. Copies of the tickets issued to these passengers show that they covered transportation from the above points of origin to the final destination, San Diego. Upon arrival of Flight 201 in Burbank on September 22, 1953, the 6 passengers were transferred to Pacific Southwest Flight 12 for their continuing transportation to San Diego. This transportation was purchased from Pacific Southwest Airlines by an exchange order which was issued to North American Airlines.

(2) Exhibit 9 includes passenger manifests of North American Flight 600 which show the names of 1 passenger from New York (La Guardia Airport) [22] and 1 passenger from Dallas, Texas, who departed from these cities for Burbank on August 29, 1953. Copies of the tickets issued to these passengers show that they covered transportation from the above points of origin to the final destination, San Diego. Upon arrival of Flight 600 in Burbank on August 30, 1953, the 2 passengers were transferred to Pacific Southwest Airlines Flight 12 for their continuing transportation to San Diego. This transportation was purchased

from Pacific Southwest by an exchange order which was issued to North American Airlines.

(3) Exhibit 10 is a passenger manifest of North American Flight 201 which lists the names of 19 passengers who departed Chicago for Burbank on August 28, 1953. Upon arrival in Burbank, these passengers were transferred to a flight of Pacific Southwest for their continuing transportation to Oakland as indicated in the footnote at the bottom of the manifest.

/s/ JOSEPH W. STOUT, JR.

Subscribed and sworn to before me this 29th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, Washington,
D. C.

Commission expires 1-14-58. [23]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

Robert F. Rickey, being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. Investigation by affiant of a number of Pacific Southwest Airlines (PSA) flights arriving at Lockheed Air Terminal, Burbank, from San Diego during November and December, 1953, disclosed that PSA Flight 65, arriving at 7:50 p.m., is the flight most generally used by San Diego ticket agents to connect their interstate passengers with the eastbound transcontinental flights of Large Irregular Carriers operating from Lockheed Air Terminal. For the most part, the transcontinental passengers traveling on PSA from San Diego to Burbank are transferred at Burbank to the so-called North American carriers, consisting of Hemisphere Air Transport, Trans American Airways, Inc.; Trans National Airlines, Inc.; Twentieth Century Airlines, Inc., and the Unit Export Company, Inc., and the Skycoach carriers, consisting of Currey Air Transport Ltd., and Great Lakes Airlines, Inc. Some of such passengers, however, are routed via other Large Irregular Carriers represented by the American Air Bus Agency, including U. S. Aircoach, Peninsular Air Transport, Aero Finance Corporation, Air Services, Inc., and Caribbean American Lines, Inc. On every arrival of Flight 65 observed by affiant, there were several or more passengers who, after claiming their luggage, checked in for the eastbound transcontinental flights on one of the Large Irregular Carriers. The following are representative flights:

a. On December 1, 1953, eight passengers from a total of 17 leaving Flight 65 [55] at Burbank checked in at the North American, Skycoach and

American Air Bus counters after first claiming their luggage in front of the Terminal Building.

b. On December 2, 1953, six passengers arriving from San Diego on Flight 65 held North American tickets for continuing interstate transportation and two passengers from the same flight were later observed checking in at the Skycoach counter. A total of 17 passengers left Flight 65 at Burbank.

c. On December 10, 1953, 17 passengers deplaned from Flight 65 at Burbank of which five later checked in at the North American counter and three at Skycoach for eastbound flights that night.

3. On November 24, 1953, affiant interviewed Mrs. A. J. Phillips, 2562 Weller Avenue, Baton Rouge, Louisiana, who had arrived at Lockheed Air Terminal from San Diego on PSA Flight 65 and, after claiming her baggage, checked in at the North American counter for North American Flight 500 to Dallas, Texas. An examination of her ticketing disclosed the following: Her North American ticket was OW-1 46109 and was validated "R. A. Ashment Nov 1953 San Diego." The ticket showed a routing of San Diego-Burbank-Dallas and a fare of \$54.55 plus \$8.18 Federal tax or a total of \$62.73. Although it was not shown on the North American ticket, this included the cost of PSA ticket No. 94133 from San Diego to Burbank, which ticket was issued in conjunction with the North American ticket. The North American ticket had been stamped at the check-in

counter, "Hemisphere Air Transport, Municipal Airport, Long Beach, California," to indicate the name of the carrier whose aircraft was being used for Flight 500 that night. Mrs. Phillips' receipt portion of her PSA ticket, attached hereto as Exhibit 1, was stapled to the North American ticket. Mrs. Phillips stated that the two tickets had been stapled together when purchased in San Diego and were presented in that form to PSA when the flight coupon of the PSA ticket was lifted by PSA.

4. On December 2, 1953, affiant made an inspection of tickets for North American's Flight 101 of the previous evening. Affiant noted that on many of the North American tickets issued in San Diego there was a PSA or a California Central Airlines ticket number written in the "Conjunction Ticket" box of the North American ticket. The following is information on four such tickets against which PSA "conjunction tickets" were issued: [56]

a. North American ticket No. OW-145995 was issued to Miss T. Gaston, 2508 Oxford Street, Middleton, Ohio, for transportation from San Diego to Chicago on NAA Flight 101 of December 1, 1953, for \$75.00 plus \$11.25 tax or a total of \$86.25. The ticket was validated by Pacific Travel Service, 4065 Pacific Highway, San Diego, on November 30, 1953. Written in the "Form" box under "Conjunction Ticket" was PSA and in the "Serial" box the number "93658." This means that PSA ticket number 93658, in addition to the above North American ticket, was issued

to Miss Gaston by Pacific Travel Service for transportation from San Diego to Burbank.

b. North American ticket No. OW-1 46053 was issued to K. G. Norton, 505 East 74th Street, Chicago, Illinois, for transportation from San Diego to Washington, D. C., on NAA Flight 500 of December 1, 1953 (this flight was consolidated with Flight 101 on December 1). The fare shown on the ticket was \$102.55 plus \$15.38 or a total of \$117.93. It was validated "Nov. 17, '53 S. D." by Agent B. Thompson in North American's San Diego Office. On the ticket is noted "PSA 94274" which is the conjunction ticket issued for San Diego-Burbank transportation via PSA.

c. North American ticket No. OW-1 46213, issued to Robert E. Draine, 331 South Monroe Street, Rushville, Illinois, was made out for transportation from San Diego to Chicago at a fare of \$75.00 plus \$11.25 Federal tax or a total of \$86.25. This ticket was validated "Dec. 1, 1953 SD" by North American's San Diego office. Conjunction ticket issued for San Diego-Burbank transportation was PSA 94592 and was so noted on the North American ticket.

d. North American ticket No. OW-1 46258, validated "Dec. 1, '53 S.D." at North American's San Diego Office, was issued to H. E. Reveron, 132 West 63rd Street, New York City, for San Diego-New York transportation at a fare of \$99.00 plus \$14.85 tax or a total of \$113.85. The "Conjunction Ticket" noted on this ticket was PSA 94591 which was for the San Diego-Burbank portion of the trip.

5. During a later check of North American tickets in the North American office on December 14, 1953, affiant made a photostatic copy, attached hereto as Exhibit 2, of a representative North American ticket issued in conjunction with a Pacific Southwest San Diego-Burbank ticket. This North American ticket, OW-1 46467, was issued to R. Umlauf for San Diego-New York transportation and bears the notation "PSA 94975" which is the number of the PSA conjunction ticket used for [57] San Diego-Burbank transportation.

6. Affiant's investigation also disclosed that ticket agents in the Oakland-San Francisco area occasionally use PSA's Flight 64 arriving in Burbank at 9:10 p.m. from Oakland and San Francisco, to connect their interstate passengers with the eastbound transcontinental flights of the Large Irregular Carriers operating out of Lockheed Air Terminal. However, because the North American, Skycoach and American Air Bus carriers frequently operate their own shuttle service to connect with their eastbound flights, interstate traffic on PSA from Oakland and San Francisco is much lighter than from San Diego where shuttles are seldom operated by the Large Irregular Carriers.

7. On December 17, 1953, affiant visited the Office of Airline Tickets, Inc., and interviewed Mr. Alex Davidson. Airline Tickets primarily represents the so-called American Air Bus transcontinental air carriers, in addition to PSA and California Central Airlines, and sells San Diego-Burbank

tickets on PSA or California Central in conjunction with eastbound tickets on the Large Irregular Carriers. Airline Tickets has established an inter-branch bank account with PSA so that, when a PSA ticket is sold by Airline Tickets, the amount of the ticket less the commission is deposited in this special account and is then transferred to the PSA account by the bank. Attached hereto as Exhibits 3, 4 and 5 are photostatic copies of representative daily ticket sales and collection reports of Airline Tickets showing sales of interstate transportation on PSA. In each of these reports, the PSA San Diego-Burbank ticket issued in conjunction with a "YY" or "ZZ" form ticket (issued by Airline Tickets principally for transportation on the American Air Bus Carriers) is so noted in the "Remarks" column of the report. Thus, Exhibit 3, the report for December 9, 1953, shows that PSA Ticket No. 94902 was sold to Mr. Winters on a PSA flight from San Diego to Burbank for December 20. Under "Remarks" is the comment, "Shuttle YY-27267." Farther up the page, the sale of ticket YY 27267 to Mr. Winters is reported. This ticket, also for December 20, is for transportation from San Diego to Chicago. Exhibit 4, the report for December 16, 1953, shows that Mr. and Mrs. Wescott were sold PSA San Diego-Burbank tickets for December 15 in conjunction with "YY" tickets, also for December 15, from San Diego to Kansas City, Kansas (KCK); and that Mr. Hannan was sold a PSA San Diego-Burbank ticket for December [58] 19 in conjunction with a "YY" ticket, also for December 19, from San Diego to

New York, N. Y. (LGA). Exhibits 5a and b, the report for December 17, shows that E. McLaughlin, S. E. Beasley, A. Krom, and R. E. Bernard were sold PSA San Diego-Burbank tickets in conjunction with "YY" and "ZZ" tickets for transportation to New York, N. Y., Washington, D. C., and return, Chicago, Illinois, and return, and Chicago, Illinois, respectively.

7. On December 15, 1953, affiant made a telephone call to the office of Transocean Air Lines, a ticket agent representing the Skycoach carriers, California Central Airlines, and PSA, for a reservation on Skycoach from San Diego to Chicago for December 17. The telephone was answered by Mr. Frank S. Ambler, who informed affiant that transportation from San Diego to Burbank would be via either California Central Airlines or PSA. On December 17, Mr. Ambler sold to affiant "Skycoach" ticket Z No. 101293, reading "San Diego to Chicago" and a PSA ticket for transportation from San Diego to Burbank. Photostatic copies of both tickets are attached hereto as Exhibit 6. The PSA ticket was stapled inside the jacket of the Skycoach ticket so that both were visible when the jacket was opened. The reverse side of the PSA ticket, attached hereto as Exhibit 7, bore the following notation:

"Pacific Southwest Airlines is engaged in Scheduled Intrastate common carriage transportation of passengers by air Exclusively within the State of

California. The company declines to carry any passenger who is traveling from or to a point outside of California and who desires to use a flight of Pacific Southwest Airlines for a portion of such interstate journey. The company reserves the right to cancel this ticket and to refund the purchase price therefor, if, within the sole discretion of the company, it appears that this ticket will be used by a person for transportation as a part of a trip which originates or terminates at any point outside of California."

Mr. Ambler stated at the time the ticket was purchased that the PSA space on Flight 715 had not yet been positively confirmed but that he was certain it would clear and he would call affiant by 2:00 p.m. He phoned affiant at his hotel at 11:50 a.m. with positive confirmation of the PSA space on Flight 715 to Burbank that evening. He further advised that affiant should check in at the PSA counter [59] at Lindbergh Field (San Diego) no later than 6:45 p.m., that the flight would leave at 7:15 p.m., make one stop at Long Beach and then go to Burbank, and that at Burbank affiant would have to claim his luggage and take it to the Skycoach counter to check in for the Burbank-Chicago flight, which flight would leave Burbank at 9:30 p.m. and arrive in Chicago at approximately 9:00 a.m. C.S.T. the following morning. Affiant arrived at Lindbergh Field at 5:55 p.m. and checked in at the PSA counter for Flight 715. He asked the PSA check-in agent about the printing on the reverse side of the ticket regarding PSA's right to refuse passage to interstate pas-

sengers. The PSA agent laughed and said affiant should have no concern over this since it was "an entirely different deal." He added that the ticket form was an old one printed some time ago which they were still using and that the notice printed thereon would not apply to affiant. The agent warned affiant that he would have to claim his luggage upon arrival at Burbank and recheck it at the Skycoach counter when he checked in for the Burbank-Chicago flight. Affiant boarded the PSA aircraft at 7:15 p.m. Before the flight left the ground at San Diego, the hostess asked affiant when she checked his coat how far he was going. Affiant replied "Chicago" and she said he would then leave this flight at Burbank. After the flight was airborne, the hostess collected tickets. Affiant's was presented to her still stapled inside the jacket of the Skycoach ticket to Chicago just as it had been presented at the check-in counter in San Diego. Nothing was said about affiant's being an interstate passenger. There were several other passengers on this flight holding Skycoach tickets.

/s/ ROBERT F. RICKEY.

Subscribed and sworn to before me this 29th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, D. C.

My commission expires: 1/14/58. [60]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

John W. Chambers, being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. During the period between January 25, 1954, and February 12, 1954, affiant personally conducted an investigation with respect to the transportation of interstate passengers by Pacific Southwest Airlines (PSA).

3. On January 25, 1954, affiant visited the ticket counter of Skycoach Airlines Agency, Inc., at Midway Airport, Chicago, Illinois, and interviewed Mr. John Davy, the Skycoach manager, with respect to Skycoach's handling of passengers destined for Oakland and San Diego, California. Mr. Davy furnished affiant the following information: Skycoach is a ticket agency representing Great Lakes Airlines, Inc., and Currey Air Transport, Inc., two Large Irregular Carriers engaged in the interstate air transportation of passengers between New York, New York; Washington, D. C.; Chicago, Illinois; Kansas City, Kansas, and other intermediate points, and Burbank, San Diego, and Oakland, California. All Skycoach flights terminate at Burbank. Every

passenger's ticket is made out to show his ultimate destination in California. The passenger manifest shows every passenger's destination in California as Burbank. However, if the passenger is going to Oakland, one asterisk is placed after the destination (BUR*), and if the passenger is going to San Diego two asterisks are used (BUR**). Immediately after departure of the Skycoach flight from Chicago, the agent on duty calls Skycoach in Kansas City giving them a complete breakdown as to the number [69] of passengers and their destination. After the plane departs Kansas City, the agent there calls Burbank with the same information and the agent in Burbank then requests PSA to block off a sufficient number of seats on their flight to accommodate the Skycoach passengers bound for San Diego. Mr. Davy did not know which carrier was used to handle the Oakland passengers.

4. On February 5, 1954, affiant visited the offices of Great Lakes Airlines, Inc., at Lockheed Air Terminal, Burbank, and interviewed Mrs. Ida Mae Hermann, Secretary-Treasurer of Great Lakes, with respect to the handling of passengers destined for San Diego and Oakland. Mrs. Hermann confirmed the information supplied to affiant by Mr. Davy with respect to the handling of San Diego passengers. As to Oakland passengers, she informed affiant that, when the passenger load warranted it, Great Lakes continued its flight to Oakland or used a DC-3 aircraft to shuttle such passengers to Oakland. When the number of passengers was insuffi-

cient to warrant the continuation of the original flight or a DC-3 shuttle flight, Great Lakes transferred the Oakland passengers to PSA or California Central. Mrs. Hermann also described to affiant the transfer procedures used by Great Lakes, which are substantially the same as those used by U. S. Aircoach and are described in paragraphs 5 and 6 of the Stout affidavit. Mrs. Hermann provided affiant with Great Lakes Airlines records showing the transfer of passengers from Great Lakes interstate flights to Pacific Southwest's flights for the following periods: October 5 through October 9, 1953; November 20 through November 30, 1953, and December 14 through December 20, 1953. These records included the transfer manifest prepared by Great Lakes Airlines and the exchange order prepared by Pacific Southwest Airlines. These records disclosed the following with respect to the transfer of interstate passengers at Burbank from Great Lakes to Pacific Southwest.

Great Lakes Flight No.	Arrival Date At Burbank	No. Persons Transferred	PSA Flight No. and Date	Destination
410	October 5	2	90-Oct. 5	San Diego
610	October 7	5½	90-Oct. 7	San Diego
810	October 9	4	90-Oct. 9	San Diego
1911	November 20	23	90 & 22 Nov. 20	San Diego
2511	November 26	5	90-Nov. 26	San Diego
2911	November 30	9	90-Nov. 30	San Diego
1512	December 16	4	902-Dec. 16	San Diego

Affiant made photostatic copies of the documents involved in the above transfers. These photostats are attached as Exhibits 1a through 7b. Each ex-

hibit consists of (1) the transfer manifest prepared by Great Lakes for Pacific Southwest showing the names of the passengers being transferred from Great Lakes interstate flight to Pacific Southwest for transportation from Burbank to their final destination in California, (2) the Pacific Southwest exchange order purchased by Great Lakes from Pacific Southwest to provide the continuing transportation of the passengers, and (3) the Pacific Southwest manifest for the flight to which the passengers were transferred. (This latter document was photostated in the offices of Pacific Southwest.)

For example, the documents comprising Exhibit 1 establish that 2 passengers who were flown from Burbank to San Diego on Pacific Southwest flight 90 on October 5, 1953, were transported to Burbank from outside of California on Great Lakes Airlines flight 410. Thus, Exhibit 1a is the transfer manifest showing that passengers Friend and Bledsoe were transported to Burbank on Great Lakes Airlines flight 410 which according to their flight report originated in New York on October 4, stopped in Philadelphia and Chicago and arrived in Burbank on October 5. The exchange order on Exhibit 1a was purchased by Great Lakes from Pacific Southwest for the continuing transportation of these two passengers. The notation in upper right hand corner of the exchange order shows that Great Lakes made payment to Pacific Southwest for the transportation of these two passengers on October 5, 1953, with

Check Number 5159. Exhibit 1b is the Pacific Southwest manifest for their flight 90 on October 5, 1953, from Burbank to San Diego showing the names of Friend and Bledsoe as passengers on the flight.

5. On February 12, 1954, affiant visited the office of Currey Air Transport, Inc., at Lockheed Air Terminal at Burbank and interviewed Miss Tillie Gamble, operations agent for that carrier. Miss Gamble confirmed the fact that [71] Currey used PSA for the transfer at Burbank of interstate passengers destined for San Diego and Oakland.

Affiant's examination of Currey Air Transport records including original passenger manifests, transfer manifests, and Pacific Southwest exchange orders for the period from October 1, 1953, through January 26, 1954, disclosed that passengers were transferred at Burbank from Currey Air Transport's interstate flights to the flights of Pacific Southwest Airlines as follows:

Currey Air Transport Flight No.	Arrival Date At Burbank	No. Persons Transferred	PSA Flight and Date	Destination
210	October 3	2	11	Oakland
510	6	2	90	San Diego
710	8	6	11	San Diego
710	8	12	81	Oakland
910	10	1	81	Oakland
910	10	5	90	San Diego
1110	12	2	12	San Diego
1310	14	6	90	San Diego
1310	14	7	81	Oakland
1510	16	4	90	San Diego
1510	16	1	25	Oakland
1710	18	6	12	San Diego
1910	20	24	125	Oakland

Currey Air Transport Flight No.	Arrival Date At Burbank	No. Persons Transferred	PSA Flight and Date	Destination
1910	20	4	90	San Diego
1910	20	1	45	Oakland
2110	22	11	90	San Diego
2310	24	6	90	San Diego
2410	25	5	12	San Diego
2410	25	1	11	San Francisco
2510	26	3	11	San Francisco
2510	26	7	90	San Diego
2610	27	4	90	San Diego
2710	28	1	90	San Diego
2710	28	4	11	Oakland
2910	30	15	90	San Diego
3010.	31	6	90	San Diego
111	November 2	5	10	San Diego
111	2	5	11	Oakland
211	3	1	90	San Diego
511	6	4	105	Oakland
511	6	3	90	San Diego
611	7	1	65	Oakland
611	7	4	90	San Diego
711	8	3	12	San Diego
811	9	3	64	San Diego
911	10	4	90	San Diego
911	10	4	11	Oakland
1011	11	6	90	San Diego
1111	12	3	90	San Diego
1111	12	2	11	Oakland
1411	15	5	12	San Diego
1611	17	9	75	Oakland
1711	18	5	90	San Diego
2211	23	2	10	San Diego
2211	23	1	10	San Diego
511	November 6	4	105	Oakland
511	6	3	90	San Diego
611	7	1	65	Oakland
611	7	4	90	San Diego
711	8	3	12	San Diego
811	9	3	64	San Diego
911	10	4	90	San Diego
911	10	4	11	Oakland

Currey Air Transport Flight No.	Arrival Date At Burbank	No. Persons Transferred	PSA Flight and Date	Destination
1011	11	6	90	San Diego
1111	12	3	90	San Diego
1111	12	2	11	Oakland
1411	15	5	12	San Diego
1611	17	9	75	Oakland
1711	18	5	90	San Diego
2211	23	2	10	San Diego
2211	23	1	10	San Diego
412	December 5	3	90	San Diego
612	7	6	31-65	Oakland
612	7	4	10	San Diego
1812	19	1	902	San Diego
1812	19	8	902	San Diego
1812	19	10	101-111	Oakland
2012	21	11	902	San Diego
2212	23	3	902	San Diego
2612	27	2	90	San Diego
2712	28	9	902	San Diego
2812	29	7	902	San Diego
3012	31	18	90	San Diego
11	January 2	12½	902	San Diego
21	3	1	90	San Diego
31	4	12	902	San Diego
41	5	12	101	Oakland
41	5	4	902	San Diego
51	6	16	745	Oakland
71	8	22	105	Oakland
111	12	4	902	San Diego
131	14	11	232	San Diego
141	15	8	105	Oakland
161	17	3	105	Oakland
181	19	4	111	Oakland
211	22	21	745	Oakland
211	22	1	105	Oakland
211	22	11	902	San Diego
231	24	4	202	San Diego
251	26	9	232	San Diego

Affiant made photostatic copies of the documents of several representative flights involving transfers at Burbank of interstate passengers from Currey Air Transport to Pacific Southwest. Affiant also made photostatic copies of the manifests of the Pacific Southwest flights involved. These documents have been matched together and are attached hereto as Exhibits 8a through 16f. Each of these exhibits consists of (1) the passenger manifest(s) of the Currey Air Transport flight on which the passengers were transported from points outside [73] the State of California, (2) the transfer manifest for the continuing transportation on Pacific Southwest of the passengers from Burbank to their final destination in California, (3) the Pacific Southwest exchange order purchased by Currey Air Transport from Pacific Southwest to provide the continuing transportation of the passengers and (4) the Pacific Southwest passenger manifest of the flight to which the passengers were transferred. For example, the documents comprising Exhibit 11 establish that 11 passengers who were flown from Burbank to San Diego on PSA flight 90 on October 22, 1953, were transported to Burbank from points outside of California on Currey Air Transport flight 2110. Thus, Exhibit 11a is a passenger manifest showing that passengers Castro, Degon, Green, Peniston and Rivers were transported from New York to Burbank on Currey Air Transport flight 2110 which departed New York on October 21, 1953. Exhibit 11b shows that passengers Smith, Morris and Marsh were transported from Philadelphia to Burbank on the same flight.

Exhibit 11c shows that passengers Kromjac, Bilbert and Grieder were transported from Chicago to Burbank on the same flight.

On arrival of Currey Air Transport flight 2110 in Burbank on October 22, these passengers were transferred to Pacific Southwest Airlines flight 90 of October 22 for their continuing transportation to San Diego as shown by Exhibit 11d, which is a copy of the transfer manifest of Currey Air Transport and the Pacific Southwest exchange order purchased by Currey Air Transport for the continuing transportation of these 11 passengers from Burbank to San Diego by Pacific Southwest. The notation at the top of the exchange order shows that Currey Air Transport made payment to Pacific Southwest for transportation of these 11 passengers by Check Number 1705 on October 23, 1954.

Exhibit 11e is a photostat of the Pacific Southwest Airlines Passenger Manifest for flight 90 on October 22 from Burbank to San Diego which shows the names of these 11 passengers.

6. On January 29, 1954, affiant visited the offices of U. S. Aircoach at Lockheed Air Terminal, Burbank, and interviewed Mr. Fritz Hutcheson, the president of U. S. Aircoach, with respect to the transfer of passengers continuing beyond Burbank to San Diego and Oakland. Mr. Hutcheson furnished affiant substantially the same information as he furnished Joseph W. Stout Jr., (See Stout [74] affidavit, Paragraphs 5 and 6) with respect to the U. S. Aircoach's use of PSA to provide onward

transportation from Burbank for its San Diego and Oakland passengers and the method for accomplishing the transfer of such passengers to PSA.

While in U. S. Aircoach's office, affiant conducted an examination of transfer manifests issued to Pacific Southwest and exchange orders from Pacific Southwest for the period from October 1, to November 8, 1953. This examination disclosed the following with respect to the transfer of interstate passengers at Burbank from U. S. Aircoach to Pacific Southwest.

U.S. Aircoach Flight No.	Arrival Date At Burbank	No. Persons Transferred	PSA Flight & Date	Destination
1004W	October 5	1	90-Oct. 5	San Diego
108W	9	4	12-Oct. 9	San Diego
108W	9	16	11-Oct. 9	Oakland
1018W	19	2	90-Oct. 19	San Diego
1026W	27	4	90-Oct. 27	San Diego
1103W	November 4	3	90-Nov. 4	San Diego
1103W	4	7	11-Nov. 4	Oakland
116W	7	6	31-Nov. 7	Oakland

Affiant made photostatic copies of the transfer manifests and exchange orders involved in the above transfers. Later, while in the offices of Pacific Southwest Airlines, affiant made photostatic copies of the manifests of the Pacific Southwest flights to which these passengers were transferred. These photostats have been assembled to illustrate the complete transaction and are attached as Exhibits 17a through 24c. For example, the documents comprising Exhibit 18 establish that 4 passengers who were flown from Burbank to San Diego on Pacific Southwest

flight 12 on October 9, 1953, were transported to Burbank from various points outside of California on U. S. Aircoach flight 108W. Thus, Exhibit 18a is a transfer manifest showing that passengers Gloster and Kettel originated in New York, passenger Sagan in Philadelphia and passenger George in Chicago and that all 4 are destined for San Diego. Exhibit 18b shows the exchange order from Pacific Southwest billing U. S. Aircoach for having transported these 4 passengers from Burbank to San Diego. Exhibit 18c is the Pacific Southwest passenger manifest for flight 12 on October 9, 1953, from Burbank to San Diego showing on lines 1, 2, 6 and 8, the same 4 names that appear on the transfer manifest.

7. On January 26, 1954, at approximately 9:15 a.m., CST, affiant visited the [75] office of North American Airlines at 7 Washington Street, Chicago, Illinois, and interviewed Miss Kennedy, the agent on duty. North American Airlines is a ticket agency representing a number of Large Irregular Carriers, including Twentieth Century Airlines, Inc.; Trans National Airlines, Inc.; Trans American Airways, Inc.; Hemisphere Air Transport, and Unit Export Company, Inc. These carriers are engaged in interstate air transportation between New York, Washington, D. C., Chicago and various other intermediate points and Burbank, San Diego and Oakland, California. Affiant inquired with respect to North American flights to San Diego and was informed that there was a daily flight to San Diego departing Chicago at 11:15 p.m. and arriving at San Diego at

12 noon the following day. Affiant then inquired whether this was a through flight and was informed that affiant would have to change to PSA at Burbank but that the fare of \$77.63 quoted by North American included the portion of the trip from Burbank to San Diego.

8. On February 1, 1954, affiant observed the arrival from New York of North American Airlines flight 201, at the Lockheed Air Terminal, Burbank, California. Passengers from this flight picked up their luggage at Baggage Area #5 on the street side of the terminal. At least 12 of these passengers then checked in at PSA counter. The agent on duty at that counter removed the pink "San Diego" baggage tags used on the North American flight and replaced them with red PSA tags. At approximately 2:30 p.m., affiant saw 13 passengers board PSA flight 114 for Long Beach and San Diego. Twelve of these passengers were those who had deplaned from the North American flight.

9. On February 4, 1954, affiant visited the office of PSA at Lindbergh Field, San Diego, and interviewed Mr. Kenneth G. Friedkin, president of PSA, with respect to the handling of interstate passengers by PSA. Affiant sought an explanation for the apparent large number of interstate passengers carried by PSA to and from points outside the State of California. Mr. Friedkin admitted that he was receiving interstate passengers from Large Irregular Carriers and transferring interstate passengers to such large irregular carriers but stated that, in his

opinion, such activity was not improper so long as he did not fly his aircraft outside of the state and did not issue through tickets to such interstate passengers. [76]

/s/ JOHN W. CHAMBERS.

Subscribed and sworn to before me this 29th day of April, 1954.

/s/ LOUISE S. MYERS.

Notary Public,

Washington, D. C.

My Commission Expires 1-14-58. [77]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

John B. Flynn, being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. On September 28, 1953, affiant visited the ticket counter of Safeway Aircoach Agency, Inc., at the Midway Terminal, Chicago, Illinois, and interviewed Mr. Dick Brinker, the agent in charge. Mr. Brinker furnished affiant with the following information: Safeway acts as a ticket agent for four air

carriers registered with the Civil Aeronautics Board as Large Irregular Carriers, namely, Peninsular Air Transport, Aero Finance Corporation, U. S. Aircoach, and Regina Cargo Airlines, Inc. These air carriers are engaged in the interstate air transportation of passengers between New York, New York; Chicago, Illinois, and other intermediate points and Burbank, San Diego and Oakland, California. Through these air carriers, Safeway holds out to the public and provides a daily service from Chicago to Burbank, San Diego, and Oakland. The flights operated by these air carriers terminate at Burbank. Passengers destined for San Diego are routed from Burbank to San Diego via Pacific Southwest Airlines, and passengers destined for Oakland are routed from Burbank to Oakland on any available carrier, including Pacific Southwest Airlines and California Central Airlines, Inc.

3. On the same day, September 28, 1953, affiant visited the ticket office of North Star Aircoach at Midway Airport, Chicago, Illinois, and interviewed Mr. Edward Kustof, the North Star station manager. Mr. Kustof furnished affiant with the following information: North Star sells air transportation on a number [151] of air carriers registered with the Board as Large Irregular Air Carriers, including Paul Mantz Air Services, Air Services, Inc., Air America, Inc., and Caribbean American Lines, Inc. These air carriers are engaged in the interstate air transportation of persons between New York, Chicago, Kansas City, and other intermediate points.

and Burbank, San Diego, and Oakland, California. Through these air carriers, North Star provides a daily service from Chicago to Kansas City, Burbank, Oakland and San Diego. San Diego passengers, he said, are routed from Burbank to San Diego on Pacific Southwest Airlines.

/s/ JOHN B. FLYNN.

Subscribed and sworn to before me this 29th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, Washington,
D. C.

My commission expires 1-14-58. [152]

[Title of District Court and Cause.]

AFFIDAVITS IN OPPOSITION TO ORDER
TO SHOW CAUSE RE PRELIMINARY
INJUNCTION [153]

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH G. FRIEDKIN
State of California,
County of San Diego—ss.

Kenneth G. Friedkin, being first duly sworn, deposes and states:

Affiant is the President of Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines.

That in such capacity, affiant is familiar with all phases of the organization and operation of said Pacific Southwest Airlines.

That affiant has reviewed the following affidavits filed in the above-entitled action on behalf of defendant.

Affidavit of Kenneth G. Friedkin, May 15, 1954.

Affidavit of Victor R. Lundy, May 15, 1954.

Affidavit of J. F. Andrews, May 15, 1954. [154]

Affidavit of Hugh N. Wood, May 15, 1954.

Affidavit of Kenneth G. Friedkin, May 15, 1954.

Affidavit of James Fischgrund, May 13, 1954.

That affiant avers that the facts set forth in said affidavits are true and correct as of the present date, with the following exceptions:

Pacific Southwest Airlines does not presently serve the city of Long Beach, California.

The number of pilots and co-pilots now employed by Pacific Southwest Airlines is 12 pilots and 5 co-pilots.

The schedules attached to said affidavits and therein referred to as current have now been superseded by the schedule attached to this affidavit as Exhibit A hereto.

/s/ KENNETH G. FRIEDKIN,

Subscribed and sworn to before me this 10th day of July, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,

Notary Public.

My commission expires October 10, 1954. [155]

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH G. FRIEDKIN

State of California,

County of San Diego—ss.

Kenneth G. Friedkin, being first duly sworn, deposes and states:

Affiant is a resident of the City and County of San Diego, State of California, and since May 6, 1949, to and including the present time, has served as the President of Friedkin Aeronautics, Inc., which during said period of time has been doing business as Pacific Southwest Airlines; that as President, affiant is familiar with all phases of the organization and operation of said Pacific Southwest Airlines, including the relationship of said company with various governmental regulatory bodies, both Federal and State; that Pacific Southwest Airlines, Inc., is an intrastate common carrier by air, operating pursuant to the rules and regulations of the Public Utilities Commission of the State of California; that the charges made for [157] passenger service are filed with said Commission; that said corporation has never been subjected to economic regulation by the Civil Aeronautics Board or the Interstate Commerce Commission.

That the routes over which Pacific Southwest Airlines presently operates, and over which the company has operated for the past four and one-half years, lie entirely within the State of California and consists of flights between the following cities in

said State: San Diego, Long Beach, Burbank, and San Francisco; that Pacific Southwest Airlines does not now, and never has, operated as a common carrier by air engaged in interstate or foreign commerce, and that it has never operated as a common carrier by air to any location in any other State or Country, other than the State of California.

That Pacific Southwest Airlines does not now, and never has, operated as a carrier by air transporting mail for or under contract with the United States Government; that said company serves as a passenger carrier only.

/s/ KENNETH G. FRIEDKIN,

Subscribed and sworn to before me this 15th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My commission expires October 10, 1954. [158]

[Title of District Court and Cause.]

AFFIDAVIT OF VICTOR R. LUNDY

State of California,
County of San Diego—ss.

Victor R. Lundy, being first duly sworn, deposes and states:

That he is Secretary-Treasurer of Friedkin Aeronautics, Inc., doing business as Pacific Southwest

Airlines, a California corporation. That the principal place of business of said corporation is Lindbergh Field, San Diego, California. That attached hereto are photostatic copies of the following documents:

1. Certificate No. 6-6-(C) of the Civil Aeronautics Administration, Department of Commerce, United States of America, certifying that Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is authorized to operate as a commercial operator and to conduct common carrier operations carrying passengers intrastate on a schedule basis in [159] accordance with the conditions therein described.

2. Order of the Public Utilities Commission of the State of California authorizing Pacific Southwest Airlines to publish and file specific passenger fare rates with said Commission.

/s/ VICTOR R. LUNDY.

Subscribed and sworn to before me this 15th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My commission expires October 10, 1954. [160]

[Title of District Court and Cause.]

AFFIDAVIT OF J. F. ANDREWS

State of California,
County of San Diego—ss.

Affiant is a resident of the City and County of San Diego, State of California, and is employed as Chief of Operations of said company, and that in such capacity he is familiar with the schedules and the number of scheduled round-trip flights maintained by the company during 1954.

That the regularly scheduled service offered to the public by said company consists of round-trip flights between San Diego, Long Beach, Burbank and San Francisco. That a copy of the currently effective flight schedules maintained by said company is attached hereto marked Exhibit A and incorporated herein by reference. That said schedules indicate the cities or stations served by said company to be as hereinabove set forth. [164]

That the scheduled stops of said company do not include Oakland, California, or Oakland Municipal Airport, and that said company discontinued scheduled service to Oakland on or about March 31, 1954, and that no scheduled flights of said company have since that date transported passengers to or from Oakland, California, with the exception of a few flights for the convenience of passengers who had made reservations for Oakland prior to the discontinuance of this service.

That said company does not operate flights upon an unscheduled basis, except to the extent that extra sections may be operated on week ends or when traffic demands. That no flights of said company serve cities or airports other than those specified hereinabove and in the attached Exhibit A.

/s/ J. F. ANDREWS.

Subscribed and sworn to before me this 15th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My commission expires October 10, 1954. [165]

[Title of District Court and Cause.]

AFFIDAVIT OF HUGH N. WOOD

State of California,
County of San Diego—ss.

Hugh N. Wood, being first duly sworn, deposes and states:

Affiant is a resident of the City and County of San Diego, State of California, and is the Traffic and Sales Manager of Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines and, acting in such capacity, is in charge of the Traffic and Sales Department of said company and is fully familiar with the extent and method in which tickets for passage on said airline are sold and distributed.

That said company has no agreement with any other airline company pursuant to which interstate passengers arriving from points outside the State of California on any of such airlines are transported by Pacific Southwest Airlines to their point of destination within the State of California or are transported by Pacific [166] Southwest Airlines to the terminals of any other such airline pursuant to any agreement.

That tickets for passage on Pacific Southwest Airlines are sold at the regularly established ticket offices operated by the company in the cities of San Diego, Long Beach, Los Angeles, Burbank, San Francisco, and that affiant has no knowledge of the availability of any tickets of said company at any location outside of the State of California; that said company does not carry passengers on tickets purchased outside of the State of California; that it does not transport passengers within the State of California upon tickets supplied by any other airline to said passengers in Chicago or New York, or elsewhere out of the State of California; that said company does not honor tickets of any other company covering passage from San Diego to Burbank, California, and from there to cities in the eastern part of the United States.

That the attached exhibits are samples of the tickets ordinarily and customarily utilized by Pacific Southwest Airlines.

/s/ HUGH N. WOOD.

Subscribed and sworn to before me this 15th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO.
Notary Public.

My commission expires October 10, 1954. [167]

[Title of District Court and Cause.]

AFFIDAVIT OF KENNETH G. FRIEDKIN

State of California,

County of San Diego—ss.

Kenneth G. Friedkin, being first duly sworn, deposes and states:

That he is President of Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines. That said company is a California corporation, organized in 1949 and having its principal office and principal place of business at Lindbergh Field, San Diego, California. Since May, 1949, Pacific Southwest Airlines has operated from one to four Douglas DC-3 High Density seating passenger planes as a scheduled carrier between cities in the State of California. The general offices, operations office, maintenance base and other general facilities are at Lindbergh Field, San Diego, California. All of the directors are residents of the San Diego area and all of the stock of the corporation is owned by residents of that Area. The company has never had any contracts to carry mail for the United States [169]

Government, nor does it carry freight or cargo of any type.

The regularly scheduled passenger carrying operations of the company are limited to service between the cities of San Diego, Long Beach, Burbank and San Francisco, California. The company formerly, but no longer, serves Oakland. All of these cities are within the State of California. All flights do not stop at each station. The company carries approximately 10,000 passengers per month.

The company's tariff structure is filed with the Public Utilities Commission of the State of California, and as a common carrier, the company is required by that agency to transport any applicant when space is available. The Civil Aeronautics Board has never heretofore attempted to assert economic jurisdiction over the company and has never heretofore asserted that the company has violated Section 401 of said Act.

The vast majority of respondent's passengers carried upon the various segments of the company's routes are local commuter-type customers. All of the cities served by this carrier are sizeable communities, having a population in every instance of over 300,000 individuals. The San Francisco-Los Angeles route is known to be the most highly traveled of any two cities in the country. The route served by the Company in no way resembles the feeder type carriers, which, in various parts of the country, includ-

ing California, serve numerous small towns, transporting many passengers with scheduled connecting flights as part of a single passage. The tickets utilized by the carrier and the statements contained upon such tickets clearly illustrate the local nature of the operations and indicate the company's studious efforts to remain clear of the conditions which would subject the carrier to the multitude of rules and regulations under which an interstate carrier must operate.

The company employs 21 pilots and co-pilots, 10 stewardesses, 11 [170] administrative and executive employees and 60 maintenance and operations personnel. The necessary effect of any injunction relating to activities of the company or its flight operations would affect and interference with the daily operations of the company and would possibly require the rerouting of flights in order to assure compliance with such injunction, in view of the contention by the Civil Aeronautics Board that local carriage of a previous or future interstate passenger constitutes "interstate air transportation" within the meaning of the Civil Aeronautics Act. In the event that Pacific Southwest Airlines may have transported passengers within such suggested definition, affiant asserts such to have been a small minority of the company's operations and that any such traffic has been further diminished since the elimination of Oakland, California, as a scheduled stop.

That it would accordingly constitute an unjust burden for defendant to be enjoined from the carriage of any passengers during the pendency of an action to determine, upon the basis of adequate and substantial evidence and a full consideration of the applicable laws, whether there has in fact been any such violation.

/s/ KENNETH G. FRIEDKIN.

Subscribed and sworn to before me this 15th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My commission expires October 10, 1954. [171]

[Title of District Court and Cause.]

AFFIDAVIT OF JACK E. DUFFY, JR.

State of California,
County of San Diego—ss.

Jack E. Duffy, Jr., being first duly sworn, deposes and states:

Affiant is a resident of the City and County of San Diego, State of California, and is the credit manager of Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, and acting in such capacity, is in charge of the Credit Department of said Company and is fully familiar with the ex-

tent and method in which tickets for passage on said airline are sold and distributed.

That said company has no argreement with any other airline company pursuant to which interstate passengers arriving from points outside the State of California on any of such airlines are transported to their point of destination within the State of California by Pacific Southwest Airlines, and that said company has no agreement with any other airline company pursuant to which interstate passengers destined for points outside the State of [172] California are transported by Pacific Southwest Airlines to the terminals of any other such airline pursuant to any agreement.

That tickets for passage on Pacific Southwest Airlines are sold only at the regularly established ticket offices operated by the company and by independent ticket agents licensed by the company, all of which offices and agents are located within the State of California; and that affiant has no knowledge of the availability of any tickets of said company at any location outside of the State of California; that said company does not carry passengers pursuant to tickets purchased outside of the State of California; that it does not transport revenue passengers within the State of California upon tickets supplied to said passengers other than tickets duly issued by Pacific Southwest Airlines; that said company does not honor tickets of any other company covering passage from San Diego to

Burbank, California, and from there to cities in the eastern part of the United States.

/s/ JACK E. DUFFY, JR.

Subscribed and sworn to before me this 21st day of June, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My commission expires October 10, 1954. [173]

[Title of District Court and Cause.]

AFFIDAVIT OF ALEX DAVIDSON

State of California,
County of San Diego—ss.

Alex Davidson, being first duly sworn, deposes and states:

That on December 17, 1953, he was employed by Airline Tickets, Inc., an airline ticket agency at San Diego, California, that he is the Alex Davidson referred to on Page 4, of the affidavit of Robert F. Rickey on file and within action.

That affiant has read the said affidavit of Robert F. Rickey and in particular that portion thereof from line 11 to line 19 on page 4 of said affidavit which reads: "On December 17, 1953, affiant visited the office of Airline Tickets, Inc., and interviewed

Mr. Alex Davidson. Airline Tickets primarily represents the so-called American Air Bus transcontinental air-carriers, in addition to P.S.A. and California Central Airlines, and sells [174] San Diego-Burbank tickets on P.S.A. or California Central in conjunction with eastbound tickets on Large Irregular Carriers. Airline Tickets has established an inter-branch bank account with P.S.A. so that, when a P.S.A. ticket is sold by Airline Tickets, the amount of the ticket less the commission is deposited in this special account and is then transferred to the P.S.A. account by the bank."

Affiant avers that while he was employed by Airline Tickets, Inc., that the proceeds of any sales by said company of tickets of P.S.A. were deposited (after subtracting the commission) in a bank account of Friedkin Aeronautics, Inc., owners and operators of P.S.A., with the Bank of America, Five Points Branch, San Diego, California. That said deposit was made by a representative of Airline Tickets, Inc., who deposited said funds with the Main Branch of the Bank of America in San Diego upon an inter-branch deposit slip pursuant to the terms of which said Bank of America would cause the funds to be credited to the bank account of Friedkin Aeronautics, Inc., at the Five Points Branch.

That the sole purpose for the handling of the aforesaid funds was the convenience and the elimination of the extension of credit by Pacific South-

west to Airline Tickets, Inc., and that it did not constitute the establishment of a joint bank account by Airline Tickets, Inc., and Pacific Southwest Airlines.

/s/ ALEX DAVIDSON.

Subscribed and sworn to before me this 14th day of May, 1954.

[Seal] /s/ ELEANOR F. GLITHERO,
Notary Public.

My Commission expires October 10, 1954. [175]

[Title of District Court and Cause.]

AFFIDAVIT OF LEWIS T. GARDINER

State of California,
County of Los Angeles—ss.

Lewis T. Gardiner, being first duly sworn, deposes and states:

That he is an Attorney-at-Law duly licensed to practice in the State of California and in the United States District Court. That he is an associate of the firm of Meserve, Mumper & Hughes, Los Angeles, California.

That affiant participated as one of the attorneys for the defendant herein, Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, in a proceeding before the National Meditation

Board, designated file No. C-2200 in the records of said National Mediation Board, entitled "In the Matter of Investigation of Representation Dispute, Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines." That said proceeding was initiated by a Notice of Hearing served upon said [176] company, pursuant to which a hearing before a mediator of the National Mediation Board was held at San Diego, California, on November 17, 1953.

That the question at issue in said proceeding and as stated in the decision of said National Mediation Board was whether Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is a carrier within the meaning of Title II, Section 201, of the Railway Labor Act, as amended. (45 USCA, Sec. 181). That the statutory language particularly applicable to the aforesaid proceeding and to the question at issue therein was whether or not said company was a "common carrier by air engaged in interstate or foreign commerce."

That subsequent to said hearing, briefs were submitted by the parties thereto, and the National Mediation Board thereafter on March 18, 1954, issued its decision and ruling in said case, a copy of which is attached hereto, being entitled, "File No. C-2200 Dismissal, March 18, 1954."

Dated: May 14, 1954.

/s/ LEWIS T. GARDINER.

Subscribed and sworn to before me this 14th day of May, 1954.

[Seal] /s/ K. A. NELSON,
Notary Public in and for the County of Los Angeles, State of California.

My commission expires Sept. 24, 1954. [177]

EXHIBIT A

National Mediation Board
Washington

File No. C-2200

In the matter of

REPRESENTATION OF EMPLOYEES

of

FRIEDKIN AERONAUTICS, INC., Doing Business as PACIFIC SOUTHWEST AIRLINES,
Airline Pilots

DISMISSAL

March 18, 1954

The services of the National Mediation Board were invoked, pursuant to Section 2, Ninth, of the Railway Labor Act, as amended, on September 28, 1953, by the Air Line Pilots Association, International, hereinafter referred to as ALPA, to investi-

gate and determine who may represent Airline Pilots, employees of Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, hereinafter referred to as the carrier.

At the time this application was received these employees were not represented by any organization or individual.

During the preliminary investigation of this application, the carrier took the position that it is not subject to the Railway Labor Act, as amended, for the reason that it is not engaged in interstate commerce within the meaning of that statute. ALPA, on the other hand, contended that certain phases of the carrier's operations bring them within the purview of the Railway Labor Act.

In view of the importance of this matter, the Board ordered a public hearing in order to afford all interested parties an opportunity to present evidence and argument in support of their respective positions. The hearing was held November 17, 1953, in the U. S. Post Office, San Diego, California, before Mediator William F. Mitchell, Jr., who, pursuant to Section 4, Fourth, of the Act, was authorized to preside at the hearing. Representatives of the organization and the carrier were present at the hearing and were afforded full opportunity to introduce evidence supporting [178] their respective positions, and to examine and cross-examine witnesses. Briefs were submitted by the parties for the consideration of the Board.

Issue

The question to be determined in this case is whether Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is a carrier within the meaning of Title II, Section 201, of the Railway Labor Act, as amended.

Discussion

Title II, Section 201, of the Act states:

“Section 201. All of the provisions of Title I of this Act, except the provisions of Section 3 thereof, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.”

Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is a California corporation, organized in 1949. It utilizes a fleet of four Douglas DC-3 passenger planes in its operations as a scheduled carrier between cities within the State of California. The general offices, operations office, maintenance base and other general facilities are at Lindbergh Field, San Diego, California. The regular scheduled operations of the carrier are limited

to service between the cities of San Diego, Long Beach, Burbank, San Francisco and Oakland, California. The Company's tariff structure is on file with the Public Utilities Commission of the State of California, and its rates are regulated [179] by that Commission.

The National Mediation Board has jurisdiction over the operations of this carrier and the provisions of the Railway Labor Act apply only if the carrier is (1) "a common carrier by air engaged in interstate or foreign commerce" or (2) "a carrier by air transporting mail for or under contract with the United States Government."

There has been no assertion made nor evidence presented to indicate that the second criterion indicated above is a factor in the case under consideration. ALPA has based its case on the assertion that the carrier is engaged in interstate commerce and, in support of this position presented extensive evidence to indicate that a traveller purchasing a ticket for passage from a point in California to a point beyond the boundaries of that state or the reverse may be carried on the portion of that trip which is within the boundaries of the State of California on the equipment of this carrier. Considerable testimony was presented to show that a ticket could be purchased from North American Air Coach System for such a trip. This line of testimony was confined to that portion of the route of Pacific Southwest between San Diego and Los Angeles or

Burbank, California; or vice versa. No evidence was presented indicating any exchange of "inter-state" passengers with other airlines at San Francisco or Oakland.

Evidence was presented, however, by the carrier and the ticket agent of the North American Air Coach System showing that this agency is not a commercial airline nor a common carrier engaged in the transportation of passengers, but acts only as a ticket bureau or agency engaged in the sale of tickets for numerous airlines, among them being Pacific Southwest Airlines. The record indicates that the tickets sold by this agency for Pacific Southwest Airlines are clearly marked to indicate that its services are confined to the State of California. While the record tends to show [180] that in some instances passengers may have utilized the services of this carrier in a portion of a journey which had its origin or ultimate destination outside the State of California, no evidence was offered to indicate that this carrier has an interchange agreement or understanding with any other carrier or agency to transport passengers on any part of an interstate journey. Further, no evidence was presented as to the volume and extent of such traffic. It was shown by the carrier that any such passengers hold or are sold tickets via Pacific Southwest Airlines for that portion of their trip in the State of California made on this carrier.

The Civil Aeronautics Administration, in issuing

a Commercial Operator's Certificate to this carrier, specifically stated that the carrier is:

“Authorized to operate as a commercial operator and to conduct common carrier operations carrying passengers intrastate on a schedule basis.” (Emphasis supplied).

Section 401 of the Civil Aeronautics Act states:

“No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority authorizing such air carrier to engage in such transportation.”

Air transportation is defined in that Act to mean: “interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.” (Section 1 (10)).

The Civil Aeronautics Board has never issued a Certificate of Public Convenience and Necessity which would be required if this carrier were engaged in interstate commerce. Nor does the record indicate that this carrier has ever applied for such a certificate. On the contrary, the evidence points to a conscientious effort on the part of the carrier to limit its [181] operations to those of an intrastate character. It does not hold itself out to the traveling public as furnishing air transportation on other than an intrastate basis in the State of California.

In only one instance since its organization in 1949 is there record of a flight outside the bounda-

ries of the State of California by this carrier. That flight was a charter operation in which the carrier furnished an airplane and flight personnel to transport a military football team from San Diego, California, to Phoenix, Arizona, and return under a special agreement with the Navy. No evidence was presented of any other instance of operation of this carrier's planes across the borders of the State of California. This isolated occasion cannot reasonably be construed as affecting the carrier's normal commercial operations as a common carrier by air engaged in intrastate business.

Conclusion

On the basis of the entire record in this case, the Board finds that Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is not a carrier within the meaning of Title II, Section 201 of the Railway Labor Act, as amended. The National Mediation Board has no jurisdiction over this carrier, and the application of the Air Line Pilots Association, International, to investigate a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act among Airline Pilots employees of that carrier, is hereby dismissed.

By order of the National Mediation Board.

/s/ E. C. THOMPSON,
Secretary.

(Seal of National Mediation Board.) U.S.A.

[Endorsed]: Filed July 12, 1954. [182]

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO
AMEND COMPLAINT

To Meserve, Mumper and Hughes, Attorneys for Defendant, Please Take Notice That on July 19, 1954, at ten o'clock a.m., or soon thereafter as counsel can be heard in Room 5, United States Court House and Post Office Building, Temple and Spring Streets, Los Angeles, California, plaintiff will move said Court to amend paragraph 3 of the Complaint herein by striking therefrom the word "Nevada" and substituting in place thereof the word "California."

Dated: July 14, 1954.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ JOSEPH D. MULLENDER, JR.,
Assistant U. S. Attorney;

JAMES E. KILDAY, and
ALBERT PARKER,
Special Assistants to the
Attorney General;

JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics Board, Attorneys for Plaintiff.

Good cause appearing therefor, it is hereby ordered that the U. S. Attorney may file and serve the above-entitled Motion and Notice thereof on July 15, 1954; and Rule 6(D) FRCP and Rule 3(B) of the local rules are hereby ordered waived.

/s/ HARRY C. WESTOVER,
United States District Judge.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 15, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES FISCHGRUND

State of California,
County of Los Angeles—ss.

James Fischgrund, being first duly sworn, deposes and says:

That he is an officer, to wit, the Executive Vice President of North American Air Coach System, Inc. That this company is not a commercial airline and is not a common carrier engaged in the transportation of passengers. That this company is, in fact, a ticket agency engaged in the sale of tickets of numerous airlines. That this company has sold tickets of Pacific Southwest Airlines in the same manner in which it has sold tickets of other airlines. That this company has no agreement with Pacific Southwest Airlines for the honoring of any tickets

of any other airline. That this company has never sold any tickets for Pacific Southwest Airlines outside of the State of California, and affiant has no knowledge of any tickets of Pacific Southwest Airlines ever being sold outside the State of California.

/s/ JAMES FISCHGRUND.

Subscribed and sworn to before me this 13th day of May, 1954.

[Seal] /s/ HELEN PETERSON,
Notary Public in and for Said
County and State.

My Commission expires August 10, 1955. [184]

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM GALLAGHER

State of California,
County of Los Angeles—ss.

William Gallagher, being first duly sworn, deposes and states:

That he is employed by Pacific Southwest Airlines as Regional Manager and is presently stationed at Lockheed Air Terminal, Burbank, California, and has been so employed for more than six months last past.

That Affiant has received a list of the irregular

or non-scheduled air carriers named in the various affidavits filed herein on behalf of plaintiff. That on July 14, 1954, he inquired of Mr. James Rudolph, Inspector, Civil Aeronautics Authority, Lockheed Air Terminal, Burbank, California, with respect to the effectiveness of the "Commercial Operators Certificate" of such air carriers, which Certificate affiant is advised is a requirement of law for the operation of such air carriers. [185] Following a review of the records of said Civil Aeronautics Authority office at Burbank, California, the aforesaid James Rudolph advised affiant that the Certificates of the following air carriers had expired and are not currently effective:

U. S. Aircoach,
Paul Mantz Air Services,
Air Services, Inc.,
Air America, Inc.,
Caribbean American Lines, Inc.

That Affiant is aware of his own knowledge that the above-named air carriers have not operated into or out of Lockheed Air Terminal at Burbank, California, as a common carrier for more than five or six months last past; that Affiant is further aware of his own knowledge that Peninsular Air Transport, Aero Finance Corporation and Regina Cargo Airlines, Inc., have not operated into or out of Lockheed Air Terminal, Burbank, California, as a common carrier for more than five or six months last past.

/s/ WILLIAM GALLAGHER.

Subscribed and sworn to before me this 17th day of July, 1954.

[Seal] /s/ FLORENTINE G. BOERNER,
Notary Public in and for Said
County and State.

My Commission expires Nov. 19, 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed July 19, 1954. [186]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON THE
PLEADINGS

Defendant moves the court to enter judgment for defendant on the pleadings in the above-entitled action on the ground that the complaint herein fails to state a claim against defendant upon which relief can be granted, in that it does not allege facts sufficient to show that defendant engaged in the carriage by aircraft of mail or persons or property as a common carrier for compensation or hire in commerce in the manner more specifically defined by the Civil Aeronautics Act of 1938, as amended. (49 U.S.C.A., Sec. 401, et seq.).

Dated: July 12, 1954.

MESERVE, MUMPER &
HUGHES.

By /s/ LEWIS T. GARDINER,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 12, 1954. [188]

[Title of District Court and Cause.]

MEMORANDUM OF OPINION RE ORDER TO SHOW CAUSE

Plaintiff Civil Aeronautics Board filed an action against defendant, doing business as Pacific Southwest Airlines, for an injunction, alleging in part that defendant was in violation of Section 401 (a) of the Civil Aeronautics Act, 49 U.S.C. 481 (a). It is alleged by plaintiff that defendant carried on its flights—operated at and between points within the State of California—a substantial number of persons whose journeys originated or terminated at places outside the State of California, and that by reason of such flights defendant engaged in interstate air transportation as an air carrier, within the meaning of the Act. It is further alleged defendant had not been issued by plaintiff a [190] certificate of public convenience and necessity, authorizing defendant to engage in such air transportation.

At the time of filing the complaint plaintiff had the Court make its order to show cause, requiring defendant to appear before this Court and show cause why, during the pendency of this action, a temporary restraining order should not be issued. The matter came on before the Court upon the order to show cause, and from the evidence introduced at the hearing it was established that Pacific Southwest Airlines is an air carrier which operates wholly within the State of California; that it does not cross state lines nor make stops at any point

outside the State of California and does not carry passengers or freight to any points outside the state. It would appear from the testimony, however, that on numerous occasions defendant did pick up passengers, for transportation wholly within the State of California, who had completed journeys from points outside the state or who were commencing journeys to points outside the state; but inasmuch as it appears that in at least some instances the defendant has transported a substantial number of persons whose journey origins or destinations have been places outside the State of California, plaintiff contends it is entitled to a temporary restraining order during the pendency of this action and, eventually, to a permanent restraining order.

Plaintiff admits this entire action depends upon the definition of the term "interstate air transportation" and that if the Court cannot find from the evidence produced before it that defendant has been engaged in interstate air transportation, this Court does not have any jurisdiction of the complaint and it should be dismissed. [191]

Defendant alleges it is not now and has never been engaged in interstate air transportation; that it is an air transportation company which operates wholly within the State of California; does not carry passengers or freight across state lines and is regulated solely by the California laws relative to intrastate air transportation companies; that it has complied with the state law and is operating under

and by virtue of state regulations and the authority vested in the State of California.

Plaintiff admits there are no reported cases sustaining its contention that a purely local air transportation company which picks up passengers to transport them between various points within the state, the origin or terminal points of whose journeys have been places outside the State of California, is engaged in interstate air transportation as defined by the Civil Aeronautics Act of 1938. Plaintiff contends, however, that a similar action was filed in the District Court of another district and that as a result thereof a Consent Decree was entered. Consequently, so far as reported cases are concerned, the instant case is one of first impression.

The Civil Aeronautics Act was passed by Congress in 1938, and it has been operative at all times since that date. During this period the administrative agencies created under the Act have attempted in only a few instances to assert jurisdiction over an intrastate air common carrier because some of its passengers, transported solely within state boundaries, may be either completing journeys which originated outside the state or commencing journeys which terminated outside the state. [192]

Defendant contends the Civil Aeronautics Act establishes two primary types of regulatory jurisdiction: (1) Safety and (2) Economic. It further contends that enforcement of safety regulations is vested in the Civil Air Administration and its scope of authority in commerce is premised in Section 1

(3) and 1 (20) of the Act, which defines the term "air commerce." It is also defendant's contention that enforcement of economic regulations is vested in the Civil Aeronautics Board, and its scope of authority in commerce is premised on Section 1 (1) and 1 (21) of the Act, which defines the term "air transportation."

Defendant alleges that although it may be subject to the safety regulations of the Civil Aeronautics Act, nevertheless, it is not subject to the economic regulatory provisions thereof. It is defendant's contention that Congress when it passed the Civil Aeronautics Act intended that economic regulatory jurisdiction could be asserted by the Federal Government only under interstate air transportation.

Plaintiff in this action somewhat concurs with defendant's contention, inasmuch as plaintiff agrees that unless the Court can find defendant has been engaged in interstate air transportation, it does not have jurisdiction. The problem is very succinctly stated in plaintiff's Memorandum of Points and Authorities in support of its motion for preliminary injunction as follows:

"The defendant has regularly and persistently transported persons as a common carrier for compensation and hire between various cities of the State of California when such transportation involved the commencement or termination of an interstate journey and thereby has engaged in interstate air transportation." [193] Plaintiff has

cited to the Court a number of cases relative to transportation by bus and railroad. However, rules and regulations relative to interstate travel by bus and railroad may not be controlling in an action filed under the Civil Aeronautics Act.

The Civil Aeronautics Act defines "air commerce," "interstate air commerce," "air transportation" and "interstate air transportation." Inasmuch as Congress has seen fit to give four definitions this Court must assume there is some distinction among the various sections.

"Air commerce" is defined as interstate, overseas or foreign air commerce or the transportation of mail by aircraft, or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas, or foreign air commerce. Air commerce, consequently must directly affect or endanger safety.

Subsection (3) of § 401 evidently is a safety regulation.

Subsection (10) defines "air transportation" as meaning interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

"Interstate air commerce" [Subsection (20)] means the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between the various states.

“Interstate air transportation” means the carriage by aircraft of persons or property as a common carrier for [194] compensation or hire or the carriage of mail by aircraft in commerce between the various states.

If the aircraft crossed state lines, it would be very easy to determine that such aircraft was engaged in air transportation. But when an aircraft does not cross a state line but carries passengers who, in furtherance of a journey after disembarking from the local aircraft may cross a state line, or picks up passengers who have partially completed a journey, crossing state lines, an entirely different and more difficult problem is presented. Do these subsections of §401 refer exclusively to aircraft? And unless the aircraft crosses a state line, is it engaged in interstate air transportation? Defendant contends the subsections refer to aircraft and do not refer to passengers.

Congress, in passing the Civil Aeronautics Act of 1938 (52 Stat. 973, Chapter 601) evidently felt there were two phases of regulation. Title IV is entitled “Air Carrier Economic Regulation” and Title VI is entitled “Civil Aeronautics Safety Regulation.” There is no contention in this action that defendant has not complied with the Act relative to safety regulations. Plaintiff is endeavoring to impose upon an intrastate carrier the economic regulations of the Act.

Congress has power to promote, protect and regulate interstate air commerce and transportation.

Congress may in its discretion occupy the whole field of air transportation or, if it so desires, may pass legislation which occupies only a part of the field in which the Federal regulation is to apply. Congress alone can determine the extent to which Federal power is applicable. Congress did occupy the entire field relative to safety regulation. Did it also occupy the [195] entire field relative to economic regulation?

When this Act was being considered by a subcommittee of the Committee on Interstate Commerce of the United States Senate (Hearing on S.3659, 75th Congress, Third Session, April 6 and 7, 1938) Senator Pat McCarran, author of the Act, gave his interpretation of what the economic regulatory scope should be. He said:

“The thought that you are exploiting now is one that the author of S.3659 himself had in mind, but he did not want to become revolutionary with one stroke. In other words, he thought that with proper cooperation between federal authorities and the state authorities for a period of time, at least, eventually if it were deemed proper, we could come to the condition whereby federal control of the air would not recognize state lines.”

Evidently there was—at least in the mind of Senator McCarran—the thought that economic regulations did not do away with state lines and that intrastate carriers, operating solely between points within the state, would not be subject to the economic regulations, but that at some time in the future Congress

could pre-empt the entire field. No effort has been made by Congress to do so. Unless it was pre-empted at the time the Act was passed, the states still have jurisdiction relative to their individual, intrastate carriers.

Since the Act was passed in 1938, so far as this Court knows this is only the second attempt to have a Court determine that Congress has pre-empted the entire field [196] relative to economic regulations. In the light of the statement as made by Senator McCarran at the time the Act was passed (that he did not believe the Act pre-empted the entire field relative to economic regulation) and inasmuch as this is the second attempt within sixteen years by which plaintiff tries to achieve by judicial determination what Congress failed to express explicitly, it is not felt that under the circumstances plaintiff is entitled to a preliminary restraining order.

Courts are called upon to interpret Acts as passed by Congress and should not by judicial determination pre-empt the legislative function of Congress. If this is the serious matter which plaintiff appears to deem it, then it is a subject for legislation; and if the necessity arises, we are quite certain Congress will pass an Act in which there is no question that it is occupying the entire field relative to economic regulation of all air carriers, regardless of state lines.

There is no dispute between the parties to this action concerning the material facts, and as herein-

before stated unless this Court finds defendant was engaged in interstate air transportation, it does not have jurisdiction. The Court finds that defendant was not engaged in interstate air transportation and, consequently, the Court is without jurisdiction, and this action must be dismissed (Rule 12, Federal Rules of Civil Procedure); and such is the order.

Dated: September 16, 1954.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed September 17, 1954. [197]

In the District Court of the United States, Southern
District of California, Central Division

No. 16754 HW

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Busi-
ness as PACIFIC SOUTHWEST AIRLINES,

Defendant.

ORDER AND JUDGMENT GRANTING
MOTION TO DISMISS

This cause came on for hearing on the 19th, 22nd, 23rd and 26th days of July, 1954, on the motion of plaintiff for preliminary injunction and on the mo-

tion of defendant to dismiss duly made herein, whereupon, after receiving evidence both oral and documentary, and after hearing arguments of counsel for the respective parties, and upon due consideration thereof, it is hereby

Ordered, Adjudged and Decreed that the motion of plaintiff for a preliminary injunction be and hereby is denied and that the motion of defendant for dismissal of the action be and hereby is granted, and judgment is hereby rendered dismissing the complaint.

Dated : September 23rd, 1954.

/s/ HARRY C. WESTOVER,
United States District
Judge. [198]

Approved as to form:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ and
JOSEPH D. MULLENDER, JR.,
Assistants U. S. Attorney;

STANLEY N. BARNES,
Assistant Attorney General;

JAMES E. KILDAY and
ALBERT PARKER,
Special Assistants to the
Attorney General;

JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics
Board;

By /s/ ANDREW J. WEISZ,
Attorneys for Plaintiff.

[Endorsed]: Filed September 23, 1954.

Docketed and entered September 24, 1954. [199]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that the Civil Aeronautics Board, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and final judgment entered in this action on September 23, 1954, denying plaintiff's motion for a preliminary injunction and granting the motion of defendant for dismissal of the action.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN F. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. WEISZ,

Assistant U. S. Attorney;

/s/ DANIEL M. FRIEDMAN,

Special Assistant to the Attorney General;

JOHN F. WRIGHT,

Attorney, Office of Compliance, Civil Aeronautics Board, Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1954. [200]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 207, inclusive, contain full, true and correct copies of Complaint; Answer; Order to Show Cause with Affidavits in Support; Affidavits in Opposition to Order to Show Cause; Affidavits of James Fischgrund and William Gallagher; Motion for Judgment on the Pleadings; Memorandum of Opinion Re Order to Show Cause; Order and Judgment Granting Motion to Dismiss; Notice of Appeal; Order Extending Time to File Record and Docket Appeal; Designation of Record on Appeal and Statement of Points on Which Appellant In-

tends to Rely on Appeal; which, together with the Reporter's Transcript of Proceedings held on July 19, 22, 23 and 26, 1954, and the original Plaintiff's Exhibits 1 to 25, inclusive, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 7th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14648. United States Court of Appeals for the Ninth Circuit. Civil Aeronautics Board, Appellant, vs. Friedkin Aeronautics, Inc., Doing Business as Pacific Southwest Airlines, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed February 8, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit
No. 14648

FRIEDKIN AERONAUTICS, INC.,
Appellant,
vs.

FRIEDKIN AERONAUTICS, INC.,
Appellee.

STATEMENT OF OBJECTIONS BY APPEL-
LEE TO PORTIONS OF RECORD DESIG-
NATED BY APPELLANT FOR INCLU-
SION IN THE PRINTED RECORD

* * *

III.

Objections of Appellee Friedkin Aeronautics, Inc.,
to the Printing of Certain Portions of the Rec-
ord as Designated by Appellant.

Appellant has designated as material to consid-
eration of this appeal and for inclusion in the
printed record certain affidavits filed in the District
Court by appellant in support of its motion for
preliminary injunction. These affidavits were exe-
cuted by the following agents or employees of ap-
pellant: John F. Wright, Compliance Attorney, and
Joseph W. Stout, Jr., Robert F. Rickey, John W.
Chambers, and John B. Flynn, all of whom were
Air Transport Examiners. At the hearing of the
matter below on July 19, 1954, the Court unequiv-
ocally indicated to said counsel for the plaintiff that
it would not consider granting injunctive relief upon

the basis of affidavits; whereupon the Court directed counsel for the plaintiff to produce witnesses in support of its motion for preliminary injunction and accordingly continued the proceeding until July 22, 1954, to afford plaintiff opportunity to do so. On July 22, 23 and 26, 1954, plaintiff, represented by said counsel, did present evidence in support of its case by the use of witnesses, to wit, the aforesaid John W. Chambers, Robert F. Rickey, and Joseph W. Stout, all of whom had prepared affidavits which appellant now seeks to have printed as part of the appellate record. In addition, plaintiff utilized witnesses Robert S. Enis, Tillie Gamble, Fritz Hutcheson, Dorothy Laumeister, Stephen C. Russell and Jack F. Wooton.

The affidavits which appellant seeks to have printed are cumulative and duplicative of the oral testimony, they are voluminous and in some instances illegible, and were prepared upon the basis of interviews of the respective affiants with third parties and consist of conclusions, assumptions and speculative observations of such affiants as a result of hearsay evidence derived by such affiants from such interviews.

Appellee submits there is no occasion for the preparation of an unduly voluminous printed record in the instant proceeding by the inclusion of the affidavits hereinabove noted and submits that the factual evidence necessary to the consideration of plaintiff's case is adequately set forth in the reporter's transcript and other documents designated by appellant and appellee.

Dated: February 25, 1955.

Respectfully submitted,

/s/ LEWIS T. GARDINER. and
MESERVE, MUMPER &
HUGHES,

Attorney for Appellee.

Friedkin Aeronautics, Inc.

[Endorsed]: Filed February 26, 1955.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 14648

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

CALIFORNIA CENTRAL AIRLINES, INCOR-
PORATED,

Appellee.

No. 14649

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Busi-
ness as PACIFIC SOUTHWEST AIRLINES,

Appellee.

STIPULATION RE CONSOLIDATION OF
APPEALS AND ORDER THEREON

Whereas, the above-entitled actions were tried to-
gether in the United States District Court for the

Southern District of California, Central Division, before the Honorable Harry C. Westover, Judge of said Court, and

Whereas, the said actions present common questions of law, and were decided upon said common questions of law in the Court below, and

Whereas, it appears both expedient and economical that these appeals should be heard and considered together,

It Is Hereby Stipulated by and between the respective parties hereto, through their attorneys, and subject to the approval of the Court, that the said appeals may be heard and considered together and consolidated for the purposes of appeal.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

JAMES E. KILDAY, and
ALBERT PARKER,

Special Assistants to the At-
torney General;

JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics
Board, Attorneys for Appellant.

MESERVE, MUMPER &
HUGHES,

By /s/ LEWIS T. GARDINER,

Attorneys for Appellee, Fried-
kin Aeronautics, Inc.

QUITTNER & STUTMAN,
PERRY H. TAFT, and
ALFRED C. ACKERSON,

By /s/ ALFRED C. ACKERSON,

Attorneys for Appellee, Cali-
fornia Central Airlines, Inc.

ORDER

Upon consideration of the foregoing stipulation,
and good cause appearing therefor,

It is Ordered that the above-entitled appeals shall
be heard and considered together, and consolidated
for purposes of appeal.

Dated: Feb. 9, 1955.

/s/ WILLIAM DENMAN,

Chief Judge.

/s/ WM. HEALY,

/s/ H. T. BONE,

Judges of the United States
Court of Appeals.

[Endorsed]: Filed February 10, 1955.

[Title of Court of Appeals and Cause.]

Nos. 14648 & 14649

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

In accordance with Rule 19(6) of the Rules of Practice of this Court, Appellant states that the points on which it intends to rely on appeal are as follows:

Point I.

The District Court erred in holding that the economic regulatory provisions of the Civil Aeronautics Act have no application to a common carrier by air whose operations of aircraft are confined within the boundaries of a single state.

Point II.

The District Court erred in failing to recognize and to hold upon the basis of the record below that defendants are engaged in unauthorized interstate air transportation within the meaning and in violation of the Civil Aeronautics Act.

Point III.

The District Court abused its discretion in denying the motions below for temporary injunctions.

Point IV.

The District Court erred in dismissing the complaints below.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ DANIEL M. FRIEDMAN,
Special Assistant to the At-
torney General;

JOHN F. WRIGHT,
Attorney, Office of Compliance, Civil Aeronautics
Board, Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 16, 1955.

No. 14,648

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTHWEST AIRLINES,

Appellee.

Brief for Appellee Friedkin Aeronautics, Inc., d/b/a Pacific Southwest Airlines.

FILED

JUL 25 1955

LEWIS T. GARDINER,
MESERVE, MUMPER & HUGHES,
612 South Flower Street,
Los Angeles 17, California,

PAUL P. O'BRIEN, CLERK

*Attorneys for Appellee, Friedkin Aeronautics,
Inc., d.b.a. Pacific Southwest Airlines.*



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I.

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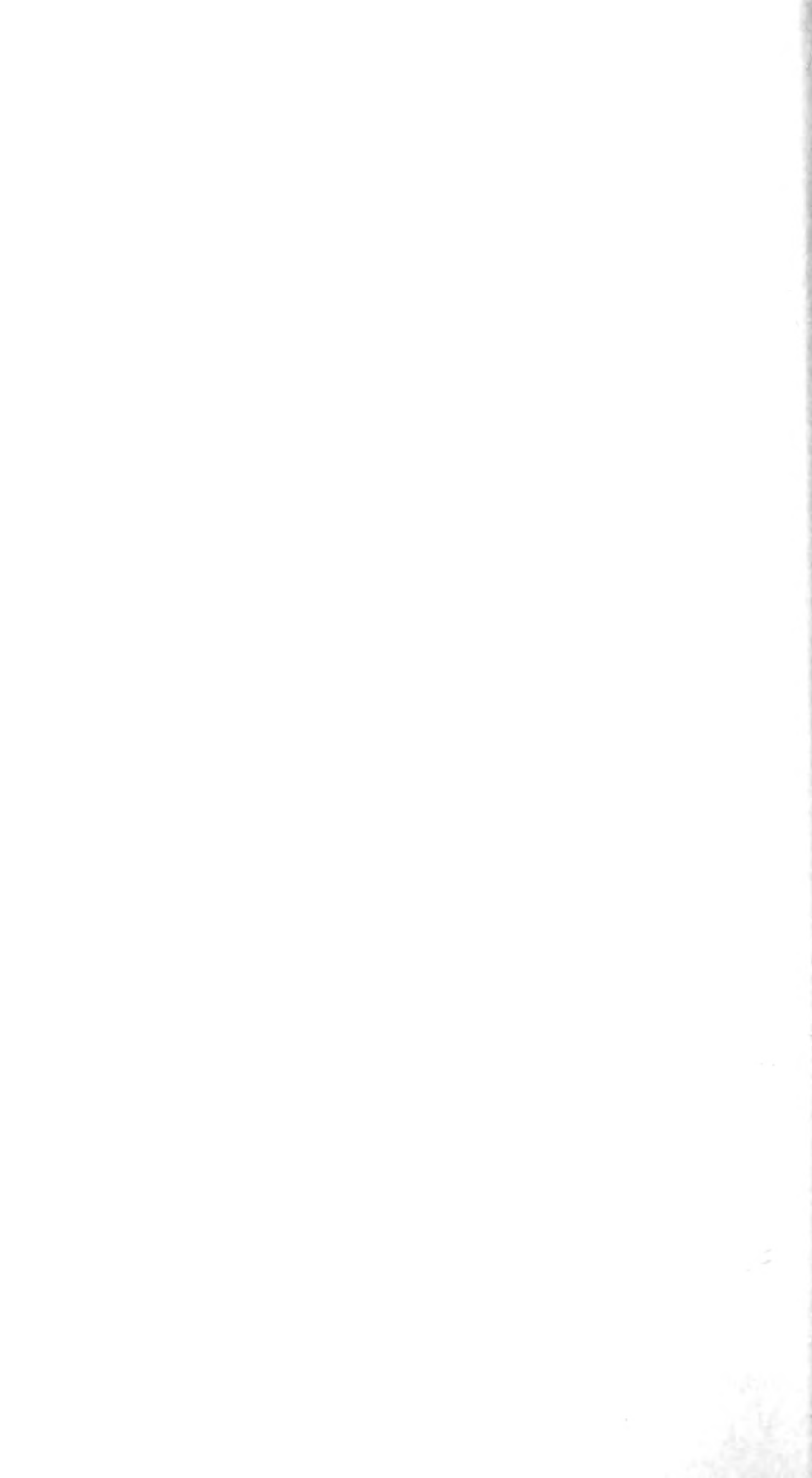
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No. 14,648

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTHWEST AIRLINES,

Appellee.

Brief for Appellee Friedkin Aeronautics, Inc., d/b/a Pacific Southwest Airlines.

Statement of the Case.

A. The Pleadings.

The instant proceeding is an appeal by the Civil Aeronautics Board from the dismissal of a complaint filed by said Board [R. 3] wherein both temporary and permanent injunctions were sought to restrain Pacific Southwest Airlines from transporting passengers within the state of California whenever such transportation follows or is preceded by a journey by the same passenger between a point in this state and a point outside this state. As a basis for such claimed relief the Board places reliance upon the provisions of the Civil Aeronautics Act of 1938, as amended; its case is necessarily predicated upon the

specific and detailed definitions of air transportation set forth in subparagraph (21) of Section 1 of that Act (49 U. S. C. A. 401).¹ The pertinent provisions of this Section are contained in an appendix to appellant's brief and in the appendix to the within brief.

The answer of appellee Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, [R. 8] admitted that it had, since 1949, been engaged as a common carrier between various cities in California and that it did not possess a certificate of public convenience and necessity authorizing it to engage in interstate air transportation. It alleged compliance with the safety requirements of the Act and possession of a certificate issued by the Civil Aeronautics Authority to operate and "to conduct common carrier operations carrying passengers intrastate on a scheduled basis" in accordance with the provisions of the Civil Aeronautics Act of 1938, as amended. The answer set up the affirmative defense that the complaint failed to state a claim against the defendant upon which relief could be granted [R. 10].

B. The Evidence.

The evidence presented in support of appellant's cause of action consisted of the reports of appellant's investigators resulting from their contacts with clerical personnel of various ticket agencies and of non-scheduled air carriers, many of whom had ceased operations at the time of the hearing before the District Court [R. 74-75]. This evidence appellant regarded as tending to show that

¹Reference to this statute and to the Civil Aeronautics Board will sometimes hereinafter be made as the "Act" and the "Board", respectively.

in some instances such ticket agencies would sell passengers a ticket upon appellee's line for transportation within California and a ticket upon another air line flying between California and an eastern city. There is no evidence or allegation that the company carries United States mail or that any of its planes depart the state of California as a part of such air transportation. The substance of the Board's evidence is that, as a result of the activities of such ticket agencies or because occasionally an incoming interstate carrier did not have sufficient traffic to warrant continuing its own flight, passengers were sometimes transported upon planes of Pacific Southwest Airlines following or preceding passage to or from a point in another state.

The opinion of the District Judge, filed on September 17, 1954, and reproduced in the record in the instant proceeding at pages 77-85, succinctly sets forth the fundamental issue before both the trial court and this court. The statement of the case contained in the appellant's brief, however, embellishes the court's opinion in certain respects which, although not unduly significant, nevertheless require rectification at this point. The assertion that any passengers moving to or from out-of-state points who might have used appellee's intrastate facilities did so as a result of any "arrangements" between appellee and any interstate or other carriers is without support in the opinion of the District Judge or the pleadings. Similarly, the assertion that this type of traffic existed with the knowledge of appellee that such passengers were engaged in interstate travel is a somewhat distorted version of the record. Upon this point and upon the equally unsupported point that a "substantial" number of passengers engaging in interstate travel were carried by appellee, a review of

the record and a reading of the opinion of the trial court will furnish considerable elucidation. Appellee will consider these matters at a later point in this brief.

C. The Issue.

The issue upon this appeal then, is not whether Congress possesses the power to authorize the Civil Aeronautics Board to assert economic regulatory control over intra-state air commerce, but whether, by the enactment of the Civil Aeronautics Act and the incorporation therein of detailed and definitive descriptions of the jurisdiction of the Board, it did in fact authorize that agency to attempt to prohibit an intrastate air carrier from incidentally transporting, as a very small portion of its total traffic, passengers who had theretofore or who did thereafter embark upon an interstate journey via another carrier.

Summary of Appellee's Argument.

The fundamental contention of appellee in the court below and the basis of the decision therein is that the applicable provisions of the Act in the light of available authorities shows that, although federal authority in the field of air safety is supreme and all-encompassing, a more restricted grant of jurisdiction exists in the licensing or economic field. Comparison of the statutory language defining "interstate air transportation" with other definitions in the Act and with the provisions of other legislation in the field of interstate commerce indicates the obvious intention of Congress to circumscribe the Board's authority with respect to economic regulatory control over air carriers as distinguished from federal authority in the fields of safety and aircraft operation.

The foregoing interpretation of the Act is not that of appellee alone. Although judicial precedents are not plentiful, the cases wherein it has been necessary to place a construction upon these definitions show concurrence in the views expressed herein. Such recognized authorities as Mr. Oswald Ryan, a member of the Civil Aeronautics Board for seventeen years, and the late Senator McCarran, the author of the Act, have repeatedly conceded the lack of federal economic regulatory jurisdiction under the present statutory provisions. Contemporaneous and subsequent legislative expressions have similarly indicated that the amendment of these definitions is a prerequisite to the type of control which the Board seeks herein by judicial interpretation. Finally, the administrative construction of the Civil Aeronautics Act by the Board and the pronouncements of other federal courts have in several instances contained expressions of opinion contrary to the position of the Board herein.

The decisions of the federal courts in similar types of cases arising under federal statutes containing jurisdictional provisions far broader than that here involved are indicative of the principle that, even under those statutes, activities of the type here under consideration are not to be regarded as the type of activity over which Congress has seen fit to assert authority. In fact, in a number of administrative proceedings under certain other federal enactments, and in some cases under the Civil Aeronautics Act itself, the operations of each appellee in the within proceedings have come under the scrutiny of such agencies and in each instance the decision has been that the operations here in question have not been such as to warrant the exercise of federal control.

A review of the record herein will disclose that an extended investigation by the Board, in which appellee cooperated fully, has failed to disclose any more than an inconsiderable number of instances wherein passengers journeying from a place in one state to a place in another state had made use of appellee's facilities. Although Pacific Southwest Airlines is a modest operation in comparison with some of the trunkline air carriers in the United States, its volume of commuter-type traffic is indeed large when contrasted with the alleged number of "interstate" passengers which appellant attributes to it. Such passengers as may have utilized appellee's facilities in this manner are shown by the record to have done so as a disconnected portion of their interstate trip. Ticketing procedures, baggage handling and all aspects of appellee's operations are seen to be apart from and unrelated to those of any other carriers. The record further shows that asserted arrangements with other carriers are in truth and fact nothing more than the simultaneous sale of tickets upon the lines of such carriers and appellee by independent ticket agencies; the volume of this type of traffic is seen to be virtually *de minimus* in contrast with the total business of either the appellee, the non-scheduled airlines or the air transportation industry. To give consideration to the same in the face of appellee's obligations as a common carrier would be to ignore both legal and equitable considerations bearing upon the instant controversy.

ARGUMENT.

I.

The Definition of "Interstate Air Transportation" in the Civil Aeronautics Act of 1938, as Amended, Does Not Include the Intrastate Carriage of Passengers by a Common Carrier Which Does Not Cross a State Line While Engaged in Such Carriage.

A. Interpretation and Analysis of the Definition of Interstate Air Transportation.

As indicated above, the text of Section 1(21) of the Civil Aeronautics Act of 1938 (49 U. S. C. A. 401) is set forth in the appendix to both the appellant's and the within brief. Simplified by the elimination of references to the District of Columbia and the Territories and Possessions, over which Congress has plenary jurisdiction, interstate air transportation of passengers is seen to mean the carriage by aircraft of persons as a common carrier for compensation or hire in commerce between a place in one state and a place in any other state. In reading the complete subparagraph and not just a selected phrase therefrom, it is seen that this is a far different and far more specific statute than one covering parties who are engaged in "interstate commerce" or "the production of goods for commerce" or in activities which "affect interstate commerce" or statutes which refer to restraints of or burdens upon interstate commerce. Because of this narrow definition contained in the Civil Aeronautics Act, decisions under these other statutes are of little avail to appellant. On the other hand, decisions holding that comparable activities do not

constitute interstate commerce under such broader definitions, *a fortiori* support appellee's position under the more restricted law.

From the outset, the United States Supreme Court has declared that commerce among the several states does not cover that which is completely internal or which is carried on between different parts of the same state. From the time of *Gibbons v. Ogden* and the case of *The Daniel Ball*, innumerable decisions have recognized, however, that as to matters of *safety and inspection*, in some instances Congress could lawfully apply certain standards of conduct to those engaged in *intrastate* commerce where such is necessary to the protection of *interstate* commerce. The Civil Aeronautics Act follows this pattern. Those portions of the legislation relating to the operational or navigational aspects of aircraft apply by their terms to any aircraft or to any pilot "which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce," regardless of the local nature of the flight. (Secs. 1(3); 601 *et seq.*) Whether or not Congress could have similarly exerted its authority under the commerce clause with respect to the economic regulation of intrastate commerce need not here concern us. Under the present Act, Congress has not exercised any such power.

Mr. Oswald Ryan, an original member of the Civil Aeronautics Board and, until very recently still a member of such Board, has analyzed the pertinent provisions of the Act in an article in 31 Virginia Law Review 479. At page 482 he points out:

"The new federal act provided regulation for air transportation both in the economic and in the safety fields. But while it limited the economic control to interstate, overseas and foreign air transportation

(and all transportation of air mail), its safety provisions covered not only interstate, overseas and foreign air commerce but also 'the navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects or which may endanger safety in interstate, overseas or foreign air commerce.' The jurisdiction imposed with respect to air safety was broader, therefore, than that imposed upon the economics of air transportation since it embraced all air transportation that traverses the vast system of federal airways; all air navigation which directly affects or may endanger safety upon those airways; all air transportation that carries air mail; the great volume of nonscheduled air commerce of an interstate character which operates outside the federal airways, and also all air navigation that directly affects or may endanger the safety of this 'off-the-airways' interstate navigation."

Again, at page 497, Mr. Ryan shows how the statutory language under which economic controls are imposed is more restricted than the definition of "air commerce" under which safety regulation is affected:

"The Civil Aeronautics Act of 1938 regulates 'air commerce' and 'air transportation.' Air transportation is defined to mean 'interstate, overseas or foreign air transportation or the transportation of mail by aircraft' and its use is, generally speaking, confined to those provisions which deal with economic regulation. The term 'air commerce' is defined to mean 'interstate, overseas or foreign air commerce or the transportation of mail by aircraft *or any operation or navigation by aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas or foreign air commerce.*' (Emphasis

supplied.) It will be noted that the definition of 'air commerce' has a much broader application than 'air transportation.' Its use is limited, however, to the safety regulatory provisions of the Act. The power thus conferred upon the Civil Aeronautics Board to regulate any operations or navigation of aircraft which affects or endangers safety in interstate air commerce has been exercised by the Board through regulation imposing a requirement for a federal license on all aircraft and all airmen, without distinction between those engaged in interstate or intrastate commerce, or in commercial or non-commercial flying, and whether on or off the civil airways."

Mr. Ryan's article discusses the Uniform State Air Carrier Bill and also refers to the subject of state laws covering economic regulatory measures over air carriers. Appellee contends that the very existence of these state measures is corroborative of the fact that Congress has not usurped the field of intrastate air carriage, as is the fact that Congress has considered and rejected numerous amendments to the 1938 Act which would extend Federal economic control to intrastate air carriers.² In discussing the appropriate scope for state economic regulation Board member Ryan suggests that an intrastate operation paralleling and competing with an interstate operation is a type of service which a state might certificate. At page 520 he describes the following hypothetical but analogous situation:

"If, for example, a state operator should fly between San Francisco and Los Angeles or between El Paso and Texarkana, or between New York and Buffalo, the resulting diversion of traffic from the

²See, *infra*, under the heading "Legislative History."

interstate operator would undoubtedly supply the constitutional basis for the exercise of federal control. It is clear, however, that Congress thus far has not exerted its power to impose any such economic control over intrastate air operations.”

For a more recent analysis of the Act with a corresponding conclusion, see 7 Cal. Jur. 2d, Aviation, Sec. 12, at page 463, the following appears:

“The federal jurisdiction asserted by the Civil Aeronautics Act with respect to economic regulation of civil aviation is not as extensive as in the field of safety in two important respects—it extends only to common carriage by air, *and only to those actually engaging* in interstate, overseas, or foreign commerce. It does not in terms extend to anyone who by his activities only affects, or places a burden upon, interstate or foreign commerce in the air. This more limited authority in the economic field results from the fact that Congress provided for economic jurisdiction only over ‘air transportation,’ which, as defined in the act, means (1) transportation of the United States mail, or (2) the carriage of persons or property as a common carrier for compensation in interstate, overseas, or foreign commerce, whether such commerce moves only by aircraft, or partly by aircraft and partly by other forms of transportation.” (Emphasis added.)

The exercise of state and federal authority with respect to the economic regulation of intrastate flights of air carriers has resulted in recent judicial scrutiny of the Civil Aeronautics Act with respect to this point. In *People v. Western Airlines, Inc.*, 42 Cal. 2d 621, 268 P. 2d 723 (1954), penalties imposed by the California Public Utilities Commission were upheld against the defendant

carrier for increasing fares charged for intrastate transportation without approval of that commission.³ In rejecting the defense that any regulation of an interstate air carrier by states is barred by the Civil Aeronautics Act, the court considered the extent to which Congress has asserted its jurisdiction over civil aviation. After pointing out that this depends upon the terms of the legislation which has been adopted, the California Supreme Court stated, at page 644:

“Sections 601-610, 49 U. S. C. A. §§55-560, state the jurisdiction asserted over safety factors of air carrier regulation; sections 401-416, 49 U. S. C. A. §§481-496, over economic factors. Rates and tariffs are controlled by the latter sections. *Under those provisions and the definitions contained in section 1, 49 U. S. C. A. §401, it seems clear that Congress has not sought to extend the economic regulation of the board to intrastate transportation of persons or property other than mail; nor has it attempted to oust the states of control over such rates.*”

* * * * *

“There is no language indicating that Congress intended to pre-empt the field of economic regulatory control of air transportation so as to include the transportation of passengers solely between points within a state and not involving the use of the air-space outside of the state. We are not concerned on this appeal with the question whether Congress could

³In a companion case, *People v. California Central Airlines*, 42 Cal. 2d 877, 268 P. 2d 744 (1954), the court said: “Any difference in factual background in that this company is not federally certificated, that it operates entirely intrastate and that it did not petition for review of the commission’s decision and order of April 24, 1951, does not affect the result.”

properly assert such power. There appear to have been no decisions of the United States Supreme Court defining the limits of such regulatory control.

“Attention has been called to numerous recommendations and bills presented to Congress, prior to and since the enactment of the Civil Aeronautics Act of 1938 seeking to extend federal economic regulation to include intrastate operations of air carriers, and also to the fact that none of these has been enacted into law. This would seem to strengthen the conclusion that Congress has not assumed control over carriers to the exclusion of state control as to their intrastate rates.”⁴ (Emphasis added.)

Another decision of the United States District Court, Southern District of California, has recently described one of the appellees herein as not being engaged in interstate air transportation within the meaning of the Act. *In the Matters of Airline Transport Carriers, Inc., and California Central Airlines, Inc.* (Feb. 28, 1955), 2 C.C.H. Aviation Law Reporter, Par. 17,618. As stated by Hall, D. J.:

“Clearly California Central Airlines was not an ‘air carrier’ as defined by Section 401 of Title 49, since it was not engaged in ‘air transportation’ involving ‘interstate, overseas or foreign air commerce or the transportation of mail by aircraft.’ It did none of those things, and the terms of the Civil Aeronautics Act do not apply to it, and hence, not to the sale of its assets by the trustees.”

⁴The Attorney General of Utah has also expressed the opinion that the Public Service Commission of the State of Utah has exclusive jurisdiction of any intrastate air service which is a public utility. (2 C. C. H. Aviation Law Reporter 23,179.)

Appellant has cited *Civil Aeronautics Board v. Canadian Colonial Airways*, 41 Fed. Supp. 1006 (1940). Examination of the opinion in that case will disclose that not only was the carrier resisting the imposition of economic regulatory control, but it was protesting the right of the Civil Aeronautics Authority to require adherence to the safety regulations. As hereinbefore stated, there is no question that the Civil Aeronautics Act constitutes a full expression of the Congressional power over commerce in this regard. (See App. Br. p. 8, fn. 3.) The cited decision merely constituted a ruling upon a discovery procedure and granted the Board the right to ascertain the names and addresses of the carrier's passengers.

The conclusion of the California court that new legislation would be required in order that the Board might possess authority over the intrastate operations of air carriers has recently been recognized by an official committee charged with the duty of exploring, among other things, this very subject.⁵ Furthermore, in the Annual

⁵At the request of President Eisenhower, in the fall of 1953, the Air Coordinating Committee, acting for and on behalf of the federal government, undertook a comprehensive review of federal aviation policies. The Chairman and Co-chairman of this Committee were, respectively, Robert B. Murray, Jr., Undersecretary of Commerce for Transportation, and Chan Gurney, Chairman, Civil Aeronautics Board, and the report of the Committee, "Civil Air Policy", dated May 1, 1954, contains a chapter headed "Federal-State-Local Regulations". Under a subheading, "Economic Regulations", the following discussion appears at page 45:

"The Civil Aeronautics Board has authority under the Civil Aeronautics Act of 1938, as amended, to regulate passenger and property rates charged by air carriers for interstate transportation by air. The Board does not have, however, direct power to fix such rates for carriage performed over intrastate segments by interstate carriers. Nor does the Board have

Report of the Civil Aeronautics Board for the year 1954⁶ under the heading "Legislation", the Board's recommendations for new legislation include the following:

"8. To authorize the Board to exercise rate control over intrastate segments of interstate air carrier routes."

It is submitted that the clear-cut and unequivocal construction of this legislation by recognized authorities in the field of aviation legislation and the thorough analysis⁷ of the statute in *People v. Western Airlines, supra*, furnish compelling reasons for concluding that the definition of "interstate air transportation" in the Act does not include the intrastate carriage of passengers by a common carrier which does not cross a state line while engaged in such carriage.

B. Administrative Construction of the Civil Aeronautics Act.

Appellant asserts that the construction and administrative interpretation of the Act by the Civil Aero-

express power to fix passenger and property rates charged by an intrastate carrier engaged in carrying the mails.

"Fares and rates charged on such intrastate routes may have a direct effect on the subsidy needs of the carrier involved; in certain instances such rates could also result in a burden on interstate commerce. We believe that Federal funds should not be utilized to finance intrastate commerce by air and that interstate commerce should bear no more than its proportionate share of the combined costs of intrastate and interstate operations. *We believe that additional legislation to vest power in the Board to control this situation is desirable.*" (Emphasis added.)

⁶U. S. Government Printing Office (1955), p. 38.

⁷Five pages of the court's opinion are devoted to an analysis of the interstate-intrastate conflict.

navitics Board is entitled to great weight as being that of the agency charged with administering the statute. Among others, the case of *Canadian Colonial Investigation*, 2 C.A.B. 752 (1941) is discussed. It is submitted, however, that the language of the Board in that case which immediately follows the portion quoted by appellant is more in accord with appellee's contention that Congress has not yet extended economic regulation of the instant subject to the Civil Aeronautics Board. This passage reads as follows:

"It may be that if such a situation as has arisen here had been foreseen Congress would have given 'air transportation' a broader definition. There are obvious reasons for bringing within the scope of economic regulation all operations of aircraft for hire through the airspace of the United States. We are not, however, concerned with what the law might have been, but what it is."

More recently, in the case of *Allegheny Airlines, Inc. and Southwest Airways Company*, C.A.B. Docket Nos. 7030, 7039, 2 C.C.H. Aviation Law Reporter, Par. 21,822 (April 20, 1955), the Board's opinion refers to one of the appellees in the instant proceeding in the following language:

"The benefits to the public interest in the instant transaction far outweigh the detriments. It must be borne in mind that California Central conducted *in-trastate* operations within California, and thus that the effect upon *interstate air transportation*, as defined

by the Civil Aeronautics Act, caused by the elimination of the bankrupts' service is negligible.”⁸

In the instant proceeding it was recognized in the court below that the routes, schedules, passenger loads and methods of operation of the two appellees are in virtually all respects quite comparable. They are and have been competitors since each commenced operations in early 1949. The case of *Allegheny Air Lines, Inc. and Southwest Airways Co.*, *supra*, involved a proceeding to determine whether Board approval would be necessary for the sale to those companies of the transport planes utilized by California Central Airlines. When the Board concluded, as the quotation above indicates that it did, that the consequent elimination of the services of California Central Airlines would have a *negligible effect* upon interstate air transportation, was not the Board arriving at an administrative determination which should at least be persuasive in resolving the present controversy? And the conclusion necessarily follows that the effect upon interstate commerce of the operations of this appellee is similarly negligible.

⁸In this case the Board also makes reference to Pacific Southwest Airlines as an *intrastate* carrier (*ibid.*, fn. 16), which is consistent with the position of the Civil Aeronautics Authority in issuing this appellee a commercial operator's certificate wherein, after stating that the company has met the requirements of the safety standards prescribed under the Civil Aeronautics Act of 1938, the certificate provides that appellee is “authorized to operate as a commercial operator and to conduct common carrier operations carrying passengers intrastate on a scheduled basis” [R. 52, 70].

As observed by the court below, the fact that the Board has made virtually no effort toward the exercise of economic regulatory control over intrastate carriers is of some significance.⁹ Appellee submits that the true basis for such self-imposed restraint is in the lack of statutory authorization; it will next be seen that the legislative treatment of the Act since its passage would appear to corroborate this absence of jurisdiction in the Board under the present law.

C. Legislative History of the Provisions of the Act Relating to Economic Regulatory Control by the Board.

Appellant places reliance upon the assertion that some three years before the passage of the Civil Aeronautics

⁹See the language of Mr. Justice Frankfurter in *Federal Trade Commission v. Bunte Brothers, Inc.* (1941), 312 U. S. 349, at page 351:

"That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Products Co. v. United States*, 288 U. S. 294, 315, 77 L. ed. 796, 807, 53 S. Ct. 350. This practical construction of the Act by those entrusted with its administration is reinforced by the Commission's unsuccessful attempt in 1935 to secure from Congress an express grant of authority over transactions 'affecting' commerce in addition to its control of practices in commerce. S. Rep. No. 46, 74th Cong., 1st Sess. These circumstances are all the more significant in that during the whole of the Commission's life the so-called Shreveport doctrine operated in the regulatory field committed to the Interstate Commerce Commission. And it is that doctrine which gives the contention of the Trade Commission its strongest support."

Act the Congress had been considering some type of legislation in this field and that another government agency then expressed some hesitancy over the inclusion of a provision exempting operations solely within a state from the coverage of such bill. But the mere fact that congress did not adopt a bill expressly declining jurisdiction over intrastate air transportation does not thereby call for the conclusion that the Act thereby covers intrastate commerce. The court in *People v. Western Airlines, Inc.*, *supra*, answered this argument at page 645:

“It is true, as defendant points out, that Congress did not use language in the Civil Aeronautics Act of 1938 such as that employed in different legislation asserting its control over other kinds of common carriers in which it was expressly stated that such regulations shall not be construed to interfere with the exclusive exercise by each state of the power to regulate intrastate commerce. (See §1 (2) Interstate Commerce Act (49 U. S. C., §1) (railroads); §202 (b) Part II, Interstate Commerce Act (49 U. S. C. §302) (motor carriers); §303 (j) Part III, Interstate Commerce Act, (49 U. S. C. 903) (water carriers).) The failure to use such language in the Civil Aeronautics Act does not necessarily imply that federal regulation of air transportation was intended to exclude all state control.”

Acts of Congress apply only to the extent to which Congress asserts its authority—plenary jurisdiction does not attach to a subject because Congress fails to exempt it.

Rather than considering provisions rejected by Congress some years earlier, it would appear more fruitful to reflect upon the fact that in the drafting of the language prescribing the Board's jurisdiction, the Congress in 1938

had before it the considerable volume of legislation passed during the years 1934 through 1937 which, for the most part, was predicated upon the power of Congress to regulate commerce among the several states. By 1938 the United States Supreme Court had also had occasion to consider the constitutionality of most of these acts and had invariably upheld the same. The constitutional coverage of the legislation enacted during this period greatly exceeded previous enactments based upon the commerce power¹⁰ and the Supreme Court in sustaining the same found it necessary to overrule precedents of long standing. Considered in this light, then, the question must be asked as to why Congress, in adopting language setting forth the Board's economic regulatory powers, did not avail itself of this then quite apparent legislative aggrandizement and provide that the Board should be allowed to regulate or certificate any carriers, the activities of which "affected commerce" or which possessed some other indirect relationship to interstate commerce. The Congress did adopt language of this type in defining "interstate air commerce" upon which federal authority over air safety is bottomed. The fact that a distinction was drawn between "air commerce" and "air transportation" seems particularly significant in view of the then recent broadening of the

¹⁰See the dissenting opinion of Mr. Justice McReynolds in *National Labor Relations Board v. Fainblatt*, 306 U. S. 601 at 614, 83 L. Ed. 1014 at 1022 (1939), where he refers to "the tremendous enlargement of federal power . . ." and to ". . . the change of direction, no longer capable of concealment, . . ."

frontier of constitutional law in the field of interstate commerce.¹¹

Furthermore, Congress upon numerous occasions has considered bills which would have amended the Act so as to provide for more complete economic regulatory control in the Civil Aeronautics Board. These bills, to which reference is made by footnote,¹² have been presented at rather regular intervals both prior to and during the seventeen years in which the Act has been in effect. In 1953 Senate Bill 2647 was introduced by Senator McCarran, the author of the 1938 Act and the recognized Congressional leader in this field of legislation. Comprehensive and extended hearings were held by the Senate Committee on Interstate and Foreign Commerce during April, May, June and July of that year. At pages 114-115 of the

¹¹"When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly." Frankfurter, J., in *Federal Trade Commission v. Bunte Brothers, Inc.* (1941), 312 U. S. 349, at 351.

¹²Report of the Federal Aviation Commission, Sen. Doc. No. 15, 74th Cong., 1st Sess. (Jan. 30, 1935), 237-239;

78th Congress: Lea-Bailey Aviation Bill introduced as H. R. 1012 abd. S. 246; revised form of Lea-Bailey Aviation Bill, H. R. 3420; Boren Bill, H. R. 4845; Reece Bill, H. R. 4848.

79th Congress: Lea Bill, H. R. 674; Johnson Bill, S. 541; Lea Bill, H. R. 3383; S. 1.

80th Congress: Wolverton Bill, H. R. 2337.

81st Congress: Brewster Bill, S. 423; Johnson Bill, S. 445; Johnson Bill, S. 2435.

83rd Congress: McCarran Bill, S. 3647.

84th Congress: Bricker Bill, S. 308; S. 1119.

report of this hearing¹³ Senator McCarran referred to a proposed revision in the definitions of interstate air commerce and interstate air transportation. With respect to the latter, he advised the Committee:

“What I have just said with regard to the definition of ‘interstate air commerce’ applies with equal force to the definition of ‘interstate air transportation,’ at the top of page 22.

“In connection with both of these definitions, question has been raised as to what is meant by the language in clause (B), ‘interstate commerce between places in the same State.’ In the fear that the explanation I have already given on this point may have been too technical, let me say that the effect of including this particular language is to broaden Federal jurisdiction so as to include operations in interstate commerce, even though between places in the same State; while at the same time preserving the rights of the States with respect to operations which are wholly intrastate commerce as distinguished from interstate commerce.”

No action was taken by the Congress upon S. 2647 and similar legislation was again introduced in the 84th Congress, 1st session.¹⁴ As we have seen, the President’s Air Coordinating Committee and the Civil Aeronautics Board itself have gone on record to the effect that “additional legislation to vest power in the Board” over intrastate segments of interstate transportation by air is needed.¹⁵

¹³Hearings before the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Third Congress, 2nd Session, on S. 2647. U. S. Gov’t Printing Office (1954).

¹⁴S. 308; S. 1119; H. R. 4648; H. R. 4677.

¹⁵*Supra*, fns. 5 and 6.

II.

Judicial and Administrative Decisions Construing Other Federal Legislation Enacted Pursuant to the Power of Congress Over Commerce Among the Several States Support Appellee's Contention That Its Activities Are Not Covered by the Economic Regulatory Authority of the Civil Aeronautics Board.

In reading the decisions in the field of interstate transportation, one is repeatedly told that "the question whether commerce is interstate or intrastate must be determined by the essential character of the commerce." Like many other cryptic generalities, these words contain no real solution, and it is necessary to seek guidance from the decisions in the light of the particular statute and the facts involved. In determining the extent and applicability of the federal power over interstate commerce, the courts have contributed a legion of decisions, sometimes conflicting in language and result. Appellant, presumably because of the dearth of decisions construing the Civil Aeronautics Act upon the point in question, has referred to various decisions under the Sherman Anti-Trust Act, the Interstate Commerce Act, the Motor Carrier Act, the Fair Labor Standards Act, and other federal enactments. Most of the statutes under which such authorities have arisen contain definitions which assert virtually the full power of Congress over interstate commerce. Many of such laws by definition apply to conduct which merely "affects" or "burdens" commerce. Most of the cases are concerned with the shipment of goods in commerce or with interstate traffic, whereas the Civil Aeronautics Act prescribes regulatory measures directed to the carrier.

Bearing these distinctions in mind, it is nevertheless desired to devote sufficient attention to the decisions in other fields to bring out the fact that the cases cited by appellant are not necessarily representative and to demonstrate further that, even under statutory enactments containing broad and comprehensive jurisdictional grants of authority, factual situations comparable to that here under consideration have been declared to be beyond the pale of the laws in question. Indeed, with respect to two such statutes, the administrative agencies charged with enforcement thereof have declared that the activities and operations of this appellee, Pacific Southwest Airlines, during the same period as is here involved, have not been such as to warrant the assertion of jurisdiction by such agencies. These rulings, together with other administrative and judicial decisions, will now be reviewed.

A. The Railway Labor Act.

Title II, Section 201 (45 U. S. C. A. 181) of this statute provides for coverage of "every common carrier by air engaged in interstate or foreign commerce * * *." The National Mediation Board is the agency authorized to hold representation hearings and to otherwise conduct investigations of the coverage of air carriers as well as rail carriers under the act. In November, 1953, such a hearing was held at San Diego, California, with respect to Pacific Southwest Airlines. A record of such hearing was thereafter transmitted by the hearing officer to said board, the sole issue of jurisdiction was extensively briefed by the parties and on March 18, 1954, in File No. C-2200, a decision of dismissal was entered. (2 C.C.H. Aviation Law Reporter, Par. 23,183 (1954)). The order and accompanying opinion of the National Mediation Board are

set forth in the record herein, at pages 65-71. The concluding paragraph reads as follows:

“On the basis of the entire record in this case, the Board finds that Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is not a carrier within the meaning of Title II, Section 201 of the Railway Labor Act, as amended. The National Mediation Board has no jurisdiction over this carrier, and the application of the Air Line Pilots Association, International, to investigate a representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act among Airline Pilots employees of that carrier, is hereby dismissed.”

B. The National Labor Relations Act.

This legislation (29 U. S. C. A. 151 *et seq.*), first enacted in 1935, applies to employers engaged in “commerce” and to labor disputes “affecting commerce,” the latter term being defined therein as meaning “in commerce, or burdening or obstructing commerce or the free flow of commerce, * * * ” (Section 2 (7)).

Appellee, Pacific Southwest Airlines, has been subjected to an investigation as to the jurisdiction of the National Labor Relations Board under this statute. On July 30, 1954 in Cases No. 21 C. A. 1963, 1964, 1968, 1969, 1972 and 1973, proceedings of this type were dismissed by the Acting Regional Director at Los Angeles, California. The following language appears in the dismissal letter:

“As a result of the investigation, it does not appear there is sufficient evidence that the Company is engaged in commerce within the meaning of the Act to warrant further proceedings at this time. I am, therefore, refusing to issue complaint in this matter.”

Such action was consistent with the decisions of the National Labor Relations Board in comparable cases:

Chicago Motor Coach Co., 62 N.L.R.B. 890;

Williams, d.b.a. Checker Cab Co., 110 N.L.R.B. No. 109;

Cambridge Taxi Co., 101 N.L.R.B. 1328;

Airways Transportation Co., 107 N.L.R.B. 181;

See, also, *New York State Labor Relations Board v. Charman Service Corp.*, 126 N. Y. L. J. 85. (1951), 20 C.C.H. Labor Cases, Par. 66,452; aff'd without opinion (N. Y. App. Div.) 3-4-53.

C. The Sherman Anti-Trust Act.

This well known act (15 U. S. C. A. 1) applies to contracts, combinations or conspiracies "in restraint of trade or commerce among the several States" (Sec. 1). Appellant has cited *United States v. Yellow Cab Co.*, 332 U. S. 218, 91 L. Ed. 2010 (1947), which decision contains examples of transportation related to interstate commerce, part of which was held to come within the coverage of the Sherman Act and part of which did not. First, the Parmelee Transportation Co., which, under contract with the carriers and not the passengers, transports only interstate passenger traffic from one railroad station to another railroad station in Chicago, Illinois, as a necessary part of that interstate passenger's journey from one state to another. Parmelee carries no local traffic. Second, the principal taxicab operating companies in Chicago, who engage in the transportation of interstate and local travelers to and from Chicago railroad stations. Even under

the broad statutory coverage of the Sherman Act, the court held that, although the Parmelee service falls within the coverage of that act, the activities of the Yellow Cab Company and the Checker Cab Company do not constitute interstate commerce. The court stated at page 230:

“We hold, however, that such transportation is too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act. These taxicabs, in transporting passengers and their luggage to and from Chicago railroad stations, admittedly cross no state lines; by ordinance, their service is confined to transportation ‘between any two points within the corporate limits of the city.’ None of them serves only railroad passengers, all of them being required to serve ‘every person’ within the limits of Chicago. They have no contractual or other arrangement within the interstate railroads. Nor are their fares paid or collected as part of the railroad fares. In short, their relationship to interstate transit is only casual and incidental.”

This case is the basis of the decision in *Airline Transport, Inc. v. Tobin*, 198 F. 2d 249 (1952), cited by appellant. The court held drivers of airport limousines at Durham, North Carolina, to be “engaged in commerce” within the meaning of the Fair Labor Standards Act. The employer corporation, by contract with three interstate airlines, agreed that its limousines would be for the exclusive use of passengers, freight, newspapers and airline personnel and property. Many aspects of its business were controlled by the contract, including schedules and the availability of the limousines for special trips. The court reviewed these facts in the light of the decision

in *United States v. Yellow Cab Co.*, *supra*, and declared that the employer's activities more closely resembled those of the Parmelee company than the cab operations.¹⁶

D. Interstate Commerce Act.

More than fifty years of judicial interpretation of this statute have resulted in a considerable accumulation of decisions under varying factual situations. Most of the cases concern freight, rather than passengers. The decisions discussing the effect of an interruption in shipment for the most part involve stoppages upon the line of one carrier only; those in which there is an absence of any direct relationship between two separate carriers, as here, are less plentiful. Appellee urges that the examples herein set forth are factually analogous to the case at bar.

In *New York Central R. Co. v. Mahoney*, 252 U. S. 152, 64 L. Ed. 502 (1920), the plaintiff below was on a trip from Toledo, Ohio, to Pittsburgh, Pa., via Cleveland, Ohio. He travelled on a pass from Toledo to Cleveland, paid a fare to appellant carrier from Cleveland to Youngstown and intended to use a pass upon the original

¹⁶Cf. the language of Justice Brewer in *N. Y. ex rel. Pennsylvania Railroad Company v. Knight*, 192 U. S. 21, 48 L. Ed. 325 (1903):

"As we have seen, the cab service is rendered wholly within the state, and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the state; and unless the interstate character is established, locality determines the question of jurisdiction."

carrier from Youngstown to Pittsburgh. When the plaintiff was injured between Toledo and Cleveland, the court held that the law applicable to the case was Ohio law in that the portion of the trip upon which plaintiff was injured was intrastate. The basis of the decision was stated by the court as follows:

“The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mahoney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms.”

To the same effect is *White v. St. Louis Southwestern R. Co. of Texas*, 86 S. W. 962 (Tex. Civ. App., 1905).

In *Gulf, Colorado & Santa Fe Railway Company v. Texas*, 204 U. S. 403, 51 L. Ed. 540 (1907), a shipment of corn which originated in South Dakota was transferred by the original carrier to the plaintiff carrier at Texarkana, Texas. The plaintiff carried the shipment to Goldthwaite, Texas. The question arose whether the portion of the trip between Texarkana and Goldthwaite was an interstate shipment and hence not subject to the regulations of the State Railroad Commission. In holding that the second carriage was an intrastate shipment, the court stated:

“In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of

shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract.”

To the same effect is *Balesville Southwestern R. Co. v. Mims*, 111 Miss. 574, 71 So. 827 (1916).

In *Kurtz v. Pennsylvania Company*, 16 I. C. C. 410 (1909), complainant owned a mileage book good for a trip between Pittsburgh and New York. He bought a local ticket at New Castle, Pennsylvania, good to Pittsburgh, and presented the two to the Pullman Company. The company rejected complainant's proffered tickets and insisted upon receiving the interstate rate from New Castle to New York. The Commission held that the trip from New Castle to Pittsburgh was separate and distinct from the remainder of the trip, saying, “. . . not the intent of the parties but the actual transaction must be regarded. . . .”

E. Motor Carrier Act.

The case of *United States v. Capital Transit Co.*, 325 U. S. 357, 89 L. Ed. 1663 (1949), relied upon by appellant, arose under this act. The ground of the decision, however, was not the interstate character of the journey of the passengers; it was expressly predicated upon carrying out the national transportation policy declared in that

act. With respect to the interstate commerce point, the court declared at 325 U. S. 361:

“We need not consider whether they came within the second exception because of our conclusion that the Commissioner’s findings justified its order under the first exception.”

Under the Motor Carrier Act, moreover, there have been administrative decisions which are much closer upon the facts to the instant proceeding.

In the case of *Red Star Lines*, 3 M. C. C. 313 (1937), the bus route traversed was located entirely within the state of Maryland. A permit had been issued by the state covering travel between Elktown and Chestertown. The Elktown terminus was at the Pennsylvania Railroad Station. However, the carrier issued tickets only to points en route, not beyond it; it did not interchange express and carried no mail. The Interstate Commerce Commission said that the only possible fact giving a color of interstate commerce was the station connection and the showing of timetables connecting with New York and Philadelphia trains. But there were no through tickets and no evidence of any common arrangement between applicant and the railroad for interchange of passengers. Accordingly, the Commission found the bus company not engaged in interstate commerce and that the operation was not subject to the Motor Carrier Act of 1935.

Accord: *Virginia Stage Lines*, 15 M. C. C. 519 (1938).

III.

Appellee Is Indisputably an Intrastate Airline. The Use of Appellee's Facilities by Passengers Engaged in Interstate Journeys Has Been Inconsiderable and Incidental to Its Intrastate Activities.

A. The Operations of Appellee, Pacific Southwest Airlines.

Appellee, Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, is a California corporation organized in 1949 [R. 9, 72]. Since May of that year it has operated from one to four Douglas DC-3 high-density-seating passenger planes as a scheduled intrastate air carrier between cities in the state of California. The general offices, operations office, maintenance and repair base and other general facilities are at Lindbergh Field, San Diego, California. All of the directors are residents of the San Diego area and all of the stock of the corporation is owned by residents of that area. The company has never had any contracts to carry mail for the United States Government, nor does it carry freight or cargo of any type [R. 56].

The company's operations are limited to service between the cities of San Diego, Burbank and San Francisco.¹⁷ A field office with ticket agents, a dispatcher and field personnel are based at each of these stops. The company being, as stated, a scheduled carrier, is to be distinguished from the irregular or non-scheduled air carriers which operate transcontinentally. Similarly, the company in no way resembles the feeder-type carriers which in various

¹⁷Until approximately March, 1954, the company also served Long Beach and Oakland, California.

parts of the country, including California, serve numerous small towns, transporting many passengers with scheduled connecting flights on the trunk line carriers, all as part of a single passage. The vast majority of appellee's passengers, on the other hand, are local commuter-type customers.¹⁸ The tickets utilized by appellee and the fact that there are no transfer privileges between it and any other carrier clearly illustrate the local nature of the operations. [R. 55.] No sales of Pacific Southwest Airlines tickets are made outside of the state and it does not sell tickets on flights of other carriers [R. 55]. Its tickets are valid only to the destination printed thereon, and the coupon type tickets of both the scheduled trunk line carriers and the irregular non-scheduled carriers are not accepted by, or received in exchange for, flights upon Pacific Southwest Airlines [R. 55, 60].

The company's tariff structure is filed with the Public Utilities Commission of the State of California [R. 50, 52]; prior to the filing of the complaint herein the company had never been subjected to the economic regulations of the Civil Aeronautics Board [R. 50]. Various aspects of its flight operations relating to safety, equipment maintenance and pilot proficiency are subject to the Safety Regulations of the Civil Aeronautics Administration, as are the flight activities of every air line, commercial operator, private pilot or student pilot in this country.¹⁹ In this connection it is interesting to note that the Certificate furnished the company by the Air Carrier Safety Branch

¹⁸During 1953-54 the company carried approximately 10,000 passengers per month [R. 57].

¹⁹Both of the appellees herein have safety records free from fatalities.

of the Civil Aeronautics Authority authorizes the appellee to operate as "a commercial operator and to conduct common carrier operations carrying passengers intrastate on a scheduled basis" [R. 52, 70].

For appellee, or any carrier, to attempt to ascertain whether, and when, boarding passengers had previously arrived in California from an out of state point would constitute an inexorable burden. This is even more true with respect to the plans, if any, of its passengers with respect to future interstate flights. And for a carrier to reject a prospective passenger for this reason would, of course, be a violation of its duties as a common carrier.

B. Neither the Facts Alleged in the Complaint nor the Evidence in the Record Constitute a Violation of the Civil Aeronautics Act or Otherwise Entitle Appellant to Relief.

Appellee has heretofore expressed its disagreement with certain aspects of appellant's recapitulation of the facts presented by the record. While it is recognized that the issue herein is entirely a question of law it is appropriate that the legal issue be resolved in the light of the evidence presented at the hearing.

It is a matter of public record and the Court is no doubt familiar with the fact that the vast majority of interstate and foreign flights of scheduled air carriers in California arrive and depart from Los Angeles International Airport and San Francisco International Airport. A few of such flights touch at San Diego, and fewer still, at Burbank. Pacific Southwest Airlines does not serve Los Angeles International Airport. It is understandable, therefore, that appellant's evidence in its entirety related to asserted "connections" at Burbank and Oakland with the

planes of miscellaneous *non-scheduled* irregular air carriers. (The evidence relating to the asserted operations of appellee at Oakland was outmoded prior to the filing of the complaint as the company has not served that station since March, 1954.) No showing was made that Pacific Southwest Airlines flights coincide in any way with the varying arrival and departure times of these non-scheduled air carriers, nor does the record show the volume of such traffic as contrasted with that of scheduled air carriers; the record does indicate that the number of irregular carriers has constantly diminished [R. 74-75].

The basis of appellant's case appears to be predicated upon the activities of various independent ticket agencies, rather than upon the acts of the appellee carrier. The tickets accepted for passage on Pacific Southwest Airlines are sold only at the regularly established ticket offices operated by the company within the state of California and by traditional travel agencies, who also sell tickets upon various other forms of transportation [R. 55]. The fact that certain ticket agents may, upon occasion, make a reservation for a passenger upon appellee's line and also upon another line is a natural and understandable marketing procedure of such agencies. Similarly, for an intrastate carrier to "block off" or reserve a number of seats for a travel agent by no means constitutes an "arrangement" or agreement between the intrastate carrier and the interstate carrier which the customers of the travel agent may utilize for their interstate transportation. This alleged "interstate commerce by association" is a far cry from the showing necessary to bring a carrier within the coverage of the federal statute. Moreover, an occasional extension of consideration to passengers who may be delayed in arriving at the airport does not constitute such passen-

gers "connecting passengers" or otherwise change the basic nature of the operations of the intrastate carrier. Finally, the record indicates that wherever possible the interstate carriers themselves transport their continuing passengers to their ultimate California destination and it is only when the number of such passengers exceeds the capacity of the interstate carrier, or is insufficient to warrant the continuation of the flight, that the ticket agency makes other arrangements for the onward transportation of any such passengers [R. 248-249]. Very occasionally, the record indicates, the number of such passengers has been "substantial" in comparison with the capacity of appellee's airplanes (31 seats); the trial court did not declare that there was a substantial portion of the total business of either appellee of this type. As indicated heretofore, Pacific Southwest Airlines averages approximately 10,000 passengers per month; the number of persons shown to be utilizing its facilities as a portion of an interstate journey was *de minimus*.

Therefore, the most that can be said in support of appellant's contentions upon these points is that out of the several score of regularly scheduled flights conducted each week by this appellee, all within the territorial limits of the state of California, some of such flights might carry individuals who have previously completed or are then contemplating a subsequent interstate trip upon another, but not a "connecting", carrier. Similar analysis would show that in some instances certain of the appellee's flight crew might vicariously acquire knowledge of those passengers who are engaged in such interstate peregrinations. In other instances the company would have no way of knowing. Appellee is engaged in the business of running a scheduled air line between certain California cities, however, and it

is not only sound business but a legal obligation that it shall accept, without discrimination, all passengers seeking transportation, whether such persons buy their tickets individually or through a travel agency. As a common carrier licensed by the Public Utility Commission of the State of California, appellee is duty-bound, whenever space is available, to carry any persons desiring to undertake a journey upon its planes and who duly tender the stated fare.²⁰ The record shows, moreover, that appellee has studiously refrained from participating in any type of ticket interchange, transfer procedure or other arrangement with other carriers.

The operations of Pacific Southwest Airlines being restricted to the territorial limits of the state of California, are not within the purview of economic regulatory control by the Civil Aeronautics Board.

Conclusion.

The jurisdiction of the Civil Aeronautics Board under the Civil Aeronautics Act of 1938, as amended, does not authorize that agency to require an intrastate airline to hold a certificate of convenience and necessity under the Act as a condition of transporting passengers by air when such airline does not engage in flights beyond the state. This conclusion is compelled by an analysis of the statute itself and by judicial and administrative construction thereof. It is further substantiated by the legis-

²⁰California Constitution, Art. XII, Sec. 17; California Public Utilities Code, Sec. 556; California Central Airlines, *et al.*, Dec. 45624, Calif. Pub. Utilities Comm. (1951), 2 C.C.H. Aviation Law Reporter, Par. 23,132; writ of review denied by California Supreme Court, without opinion; dismissed *per curiam* for want of substantial federal question, U.S.S.C. (1-7-52).

lative history of the Act and judicial precedent in related fields.

For the foregoing reasons the judgment of the District Court herein should be affirmed.

July, 1955.

Respectfully submitted,

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APPENDIX.

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, are as follows:

DEFINITIONS.

Sec. 1 (49 U. S. C. 401). As used in this Act, unless the context otherwise requires—

(3) "Air commerce" means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(20) "Interstate air commerce," "overseas air commerce," and "foreign air commerce," respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any state of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

**In the United States Court of Appeals
for the Ninth Circuit**

CIVIL AERONAUTICS BOARD, APPELLANT

v.

**FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTH-
WEST AIRLINES, APPELLEE**

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA**

BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

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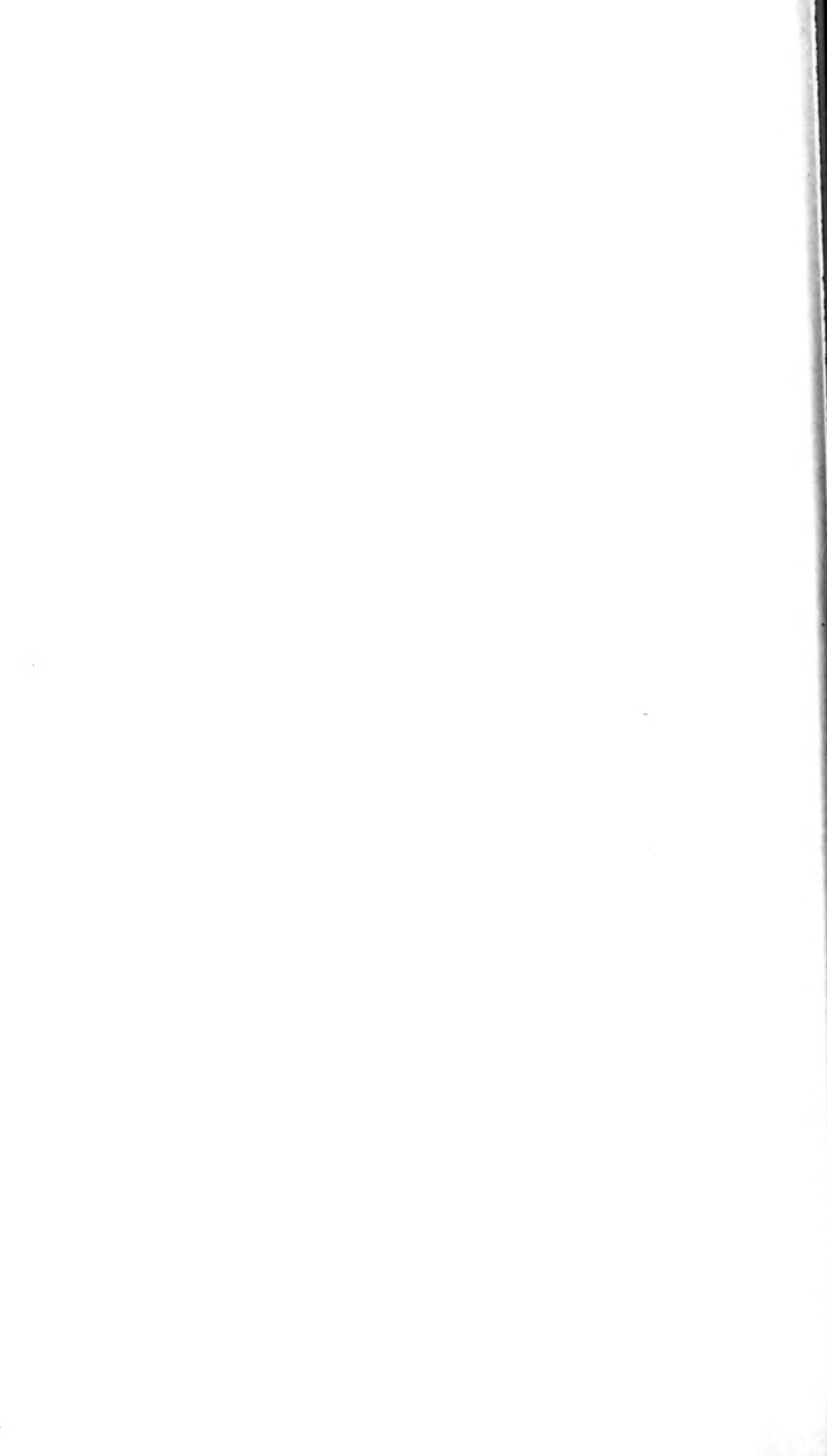
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14,648

CIVIL AERONAUTICS BOARD, APPELLANT

v.

FRIEDKIN AERONAUTICS, INC., d/b/a PACIFIC SOUTH-
WEST AIRLINES, APPELLEE

No. 14,649

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

JURISDICTIONAL STATEMENT

The complaints in these cases (R. 14,648, p. 3; R. 14,649, p. 3¹) were filed in the United States District

¹ The record herein consists of three volumes; one containing the pleadings in Case 14,648, one the pleadings in Case 14,649, and the third (Vol. II) containing the transcript of the hearing before the District Court. Record references not bearing a case number relate to Vol. II.

Court by the Civil Aeronautics Board pursuant to Section 1007 of the Civil Aeronautics Act of 1938 (*infra*, p. 25). The orders and judgments of which review is sought were entered on September 23, 1954 (R. 14,648, p. 85; R. 14,649, p. 45). Notices of appeal were filed on November 22, 1954 (R. 14,648, p. 87; R. 14,649, p. 47), and on February 9, 1955 this Court entered an order consolidating the appeals (R. 14,648, p. 92). The jurisdiction of this Court rests on 28 U. S. C. 1291 and 1292.

STATEMENT OF THE CASE

On May 6, 1954, the Civil Aeronautics Board filed in the United States District Court for the Southern District of California separate complaints alleging that, in violation of Section 401(a) of the Act, each appellee had engaged in interstate air transportation without a certificate of public convenience and necessity. The complaints sought both temporary and permanent injunctions against such unauthorized operations.

Answers to the complaints and motions for judgment on the pleadings were filed on July 12, 1954 by appellee Friedkin Aeronautics, Inc. ("Friedkin") (R. 14,648, pp. 8, 76) and on July 13, 1954 by appellee California Central Airlines, Inc. ("California Central") (R. 14,649, pp. 8, 44). Beginning on July 22, 1954, the district court heard evidence in a consolidated hearing on the Board's applications for preliminary injunctions (R. 107-359). At the conclusion of the Government's case, each appellee orally moved to dismiss the complaints (R. 365, 368).

On September 17, 1954, the district court (Judge Westover) held (R. 14,648, pp. 77-85) that appellees were not engaged in interstate air transportation, and

granted the motions to dismiss. Judgements denying the motions for temporary injunction and dismissing the complaints were entered on September 23, 1954 (R. 14,648, p. 85; R. 14,649, p. 45).

The evidence which the Government introduced is set forth in the argument, *infra* pp. 17-20. In brief, it showed that appellees are common carriers whose aircraft operate solely between points in the state of California, principally San Diego, Burbank and San Francisco. In addition to transporting local intrastate passengers between those points, appellees also carry "interstate" passengers, *i.e.*, passengers moving to and from out-of-state points who use appellees' intrastate services as an integral part of their continuous journey. Appellees carry these interstate passengers pursuant to arrangements with interstate carriers and with the knowledge that such passengers are engaged in interstate travel. Appellees do not have certificates of public convenience and necessity which are required under Section 401(a) of the Civil Aeronautics Act to engage in interstate air transportation.

In dismissing the complaints, the district court noted (R. 14,648, p. 78) that appellees have transported a "substantial" number of passengers whose journeys originate or terminate outside the state of California. It held, however, that a carrier whose aircraft does not cross state lines is not engaged in "interstate air transportation" as that term is defined in the Act. The Court stated (R. 14,648, p. 83) that although Congress had occupied "the entire field relative to safety regulation", Congress had not subjected "intrastate carriers, operating solely between points within the state" to the Board's economic regulatory jurisdiction, and that

the failure of Congress to preempt "the entire field" of economic regulation has left the states with "jurisdiction relative to their regular intrastate carriers."

STATUTES INVOLVED

The provisions of the Civil Aeronautics Act principally involved are set forth in the Appendix hereto (pp. 23 to 25). Other pertinent provisions of the Civil Aeronautics Act are cited or quoted in the text of this brief.

SPECIFICATIONS OF ERROR RELIED UPON

1. The District Court erred in holding that the economic regulatory provisions of the Civil Aeronautics Act have no application to a common carrier by air whose aircraft operate within the boundaries of a single state.

2. The District Court erred in failing to hold, upon the basis of the record below, that appellees are engaged in unauthorized interstate air transportation within the meaning and in violation of the Civil Aeronautics Act.

3. The District Court abused its discretion in denying the motions for temporary injunction.

4. The District Court erred in dismissing the complaints.

SUMMARY OF ARGUMENT

I

The decision of the District Court is incorrect because it is based on a misinterpretation of the applicable law. There is no question presented in these actions as to whether Congress has preempted or occupied the field of economic regulation of intrastate

common carriers by air to the exclusion of all state regulation, as the opinion of the District Court seems to suggest. The real issue is whether, under the statutory definition of "interstate air transportation" and applicable case law, the economic regulatory provisions of the Civil Aeronautics Act extend to physically intrastate operations insofar as they involve the carriage of a substantial number of passengers as part of a continuous interstate movement.

Interstate air transportation is defined by Section 1(21) of the Civil Aeronautics Act (*infra*, p. 24) in pertinent part to mean the carriage by aircraft of persons or property as a common carrier for compensation or hire "in commerce between" "a place in any State of the United States . . . and a place in any other State of the United States . . . whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation." Admittedly, all the requisites of jurisdiction are present here, except that appellee contends and the Court below has concluded that since appellee's aircraft do not cross state lines, appellee cannot be engaged "in commerce between" the various states.

The Court's conclusion in this respect is plainly erroneous. Congressional power over interstate commerce which forms the basis for enactment of the Civil Aeronautics Act, uniformly has been held to encompass activities and operations that take place within the boundaries of a single state. The test is the essential character of the commerce as intrastate or interstate, not the physical movement of the particular instrumentality employed. In the field of transportation, if, as here, the commerce is interstate in character,

the regulatory power of Congress attaches to it, notwithstanding the fact that some leg or portion of the movement of that commerce may involve operations solely within one state.

The legislative history of the Civil Aeronautics Act discloses, as does the face of the statute, that Congress intended to embody therein this traditional concept of commerce subject to its regulation. Proposed amendments which, if enacted, would have been open to a possible interpretation that Congress was confining the scope of the certificate provisions of the Act to only those situations where aircraft transcended state lines, were rejected by the Congress.

II

Since there is no question that appellees are, in fact, transporting a substantial number of interstate passengers pursuant to arrangements with interstate carriers, and inasmuch as the District Court's action rested solely on a mistaken view of the breadth of the applicable law, the Court below erred in denying the motions for preliminary injunction pending trial and dismissing the complaints. The equitable doctrine that a motion for a preliminary injunction is addressed to the sound discretion of the trial court has no application in this case because the District Court did not undertake to exercise any discretion in denying appellant's motion, but acted solely on the ground that the Court was without jurisdiction. Denial of a preliminary injunction founded upon a fundamental misconception of the controlling law is an abuse of discretion which requires reversal by this Court.

ARGUMENT

Introduction

There is no question that transportation performed wholly within a single state but moving in the stream of interstate commerce constitutes interstate transportation which is subject to Federal control.² Indeed, the district court recognized that fact (R. 14,648, pp. 83-84). The issue in this case is whether Congress, in the so-called "economic" regulatory provisions of the Civil Aeronautics Act, exercised that power so as to subject to Federal regulation an intrastate air carrier which transports a substantial number of interstate passengers pursuant to arrangements with interstate carriers under which the intrastate transportation constitutes either the initial or final leg of a continuous interstate journey, and the intrastate carrier has full knowledge of the interstate character of the traffic. The district court held that the Act is inapplicable. A brief discussion of the pertinent statutory provisions is necessary.

The Civil Aeronautics Act subjects both the "safety" and the "economic" aspects of air transportation to Federal regulation. Safety regulation relates to such matters as the licensing of qualified pilots and safe aircraft, and the operation of aircraft in accordance with

² See e.g., *The Daniel Ball*, 10 Wall. 557 (1870); *United States v. Union Stockyard & Transit Co.*, 220 U.S. 286 (1912); *Texas & New Orleans R.R. Co. v. Sabine Tram Co.*, 227 U.S. 111 (1913); *Railroad Commission of La. v. Texas & Pacific R. Co.*, 229 U.S. 336 (1913); *Galveston, Harrisburg & San Antonio R. Co. v. Woodbury*, 254 U.S. 357 (1920); *United States v. Capital Transit Co.*, 325 U.S. 357 (1945); *United States v. Capital Transit Co.*, 338 U.S. 286 (1949); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947).

prescribed safety procedures.³ It extends to operations in "air commerce" (Section 610), which is defined by Section 1(3) in terms sufficiently broad to cover both interstate and intrastate flights by common and private carriers. Cf. *Rosenhan v. United States*, 131 F. 2d 932, 935 (C. A. 10, 1942), cert. den., 318 U. S. 790 (1943).

Economic regulation deals with certification (licensing) of carriers, fixing of rates, acquisition of control, etc. The economic regulatory provision here involved is Section 401(a), which prohibits engaging in "air transportation" without a certificate of public convenience and necessity issued by the Board. Section 1(21) defines "interstate air transportation" as the common carriage by aircraft of persons or property "in com-

The test is the essential character of the commerce, not the locale within which the carriers taking part in the movement operate. *Illinois Central R.R. Co. v. Fuentes*, 236 U.S. 157 (1915); *Pennsylvania R.R. Co. v. Clark Brothers Coal Mining Co.*, 238 U.S. 456 (1915); *Baltimore & Ohio Southwestern R.R. Co. v. Settle*, 260 U.S. 166 (1922); *United States v. Erie R.R. Co.*, 280 U.S. 98 (1929); *New York, New Haven & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128 (1953). If the movement is interstate, it is considered to begin when the persons or goods embark upon the first participating transportation medium and terminates at the ultimate point of destination, and thus is interstate from beginning to end. *The Daniel Ball*, *supra*; *Texas & New Orleans R.R. Co. v. Sabine Tram Co.*, *supra*; *United States v. Yellow Cab Co.*, *supra*; the *Capital Transit* cases, *supra*. Cf. *Airlines Transportation, Inc. v. Tobin*, 198 F. 2d 249 (C.A. 4, 1952), wherein the court held that an airline passenger commences his journey when he boards a limousine destined for the airport.

³ The safety provisions of the statute are administered by the Civil Aeronautics Administration under standards and regulations promulgated by the Board. The Board administers the economic provisions of the Act. There is no question here involved as to safety regulation, and both appellees and the court below recognized that appellees' operations must be conducted in conformity with Federal safety requirements.

merce between" places in one state and places outside thereof.

The district court dismissed the complaints on the theory that although Congress has "occupied the field" in the case of safety regulation, it has not done so for economic regulation, and that the Board's jurisdiction in the economic area therefore does not extend to carriers whose aircraft do not cross state lines. We shall show, however, that although Congress has not occupied the entire field of economic regulation, it has, under the statutory definition of "interstate air transportation," given the Board jurisdiction to regulate the interstate aspects of intrastate carriers. We shall further show that the Board's evidence established that appellees have engaged in interstate air transportation within the meaning of the Act, and that the court therefore erred in denying our motions for preliminary injunction.

I

A Carrier May Engage in Interstate Air Transportation Under the Civil Aeronautics Act Even Though Its Aircraft Do Not Cross State Lines.

Section 401(a) of the Act requires that a certificate of public convenience and necessity issued by the Board be held by every carrier engaged in "air transportation." Section 1(10) defines these words as meaning "interstate, overseas or foreign air transportation or the transportation of mail by aircraft." Section 1(21) provides:

"Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for

compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.⁴

We submit that the test for Federal regulatory jurisdiction under Section 1(21) as evidenced from the face of the statute, is whether the traffic carried is “in com-

⁴ This clause, “whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation,” is indented here as in the enrolled bill. The bill as passed by the Senate, S. 3845, sets forth the definitions as they appear here except that the clause in question was extended to the left-hand margin of the page so that it unquestionably applied to all three subdivisions (a), (b) and (c). The conference committee, as shown by the text of the bill contained in the conference report, H. Rept. No. 2635, 75th Cong., 3d Sess., adopted the form of the Senate bill and Congress passed the bill as recommended by the conference committee, without change. Consequently, a typographical error must have been made in printing the enrolled bill.

merce between'' states, and not whether the aircraft which performs the transportation itself crosses state lines.⁵ If the word "commerce" was intended to relate to the interstate movement of the aircraft, the word would be unnecessary and meaningless. Moreover, clause (c) is inconsistent with application of the word to aircraft, since it covers commerce between a place in the United States and a place outside thereof, "whether such commerce moves wholly by aircraft or *partly by aircraft or partly by other forms of transportation*" (Emphasis supplied). A carrier which transports passengers on the intrastate leg of an interstate journey is carrying them "in commerce between" a place within the state and a place outside thereof, even though the carrier itself does not cross state lines. Congress frequently has used the words "in commerce between" states, or their equivalent, to subject intrastate aspects of interstate commerce to Federal regulation,⁶ and we submit that it intended those words to

⁵ The only possible requirement contained in Section 1(21) that aircraft cross state lines before interstate air transportation is involved in the portion of the definition defining as "interstate" that transportation between "places in the same State . . . through the air space over any place outside thereof." This portion of the definition, like the remainder of the section, is merely declaratory of existing law in this respect. Transportation between places in the same State over land or water outside the State constitutes interstate transportation even in the absence of statutory definitions so declaring. See *e.g.*, *Hanley v. Kansas Southern Ry. Co.*, 187 U.S. 617 (1903); *Missouri Pacific Railroad Co. v. Stroud*, 267 U.S. 404 (1925); *Cornell Steamboat Co. v. United States*, 321 U.S. 634 (1944). See also *United Airlines v. P.U.C. of California*, 109 F. Supp. 13 (N.D. Calif., 1952) rev. 346 U.S. 402 (1953), and our brief to the District Court therein.

⁶ See *e.g.*, Section 203(a) of the Interstate Commerce Act, 49 U.S.C. 303(a) and Section 6(a) of the Fair Labor Standards Act, 29 U.S.C. 206(a).

have the same meaning when it used them to define "interstate air transportation" in Section 1(21).

The legislative history of the Act supports this interpretation. The Act as finally passed in 1938 evolved from several years of Congressional study during which the legislation passed through a number of drafts. In 1935 bills were introduced (S. 3027, S. 3420) which would have exempted from the certification requirement air carriers which were "lawfully engaged in operation solely within any state * * *." This provision was similar to Section 206(a) of the Motor Carriers Act, which provides that carriers "lawfully engaged in operations solely within any state" pursuant to state authorization are not required to obtain from the Interstate Commerce Commission a certificate "authorizing the transportation by such carrier of passengers or property between places within such state." See *United States v. Union Pac. R. Co.*, 20 F. Supp. 665 (D. Idaho, 1937).

The Interstate Commerce Commission, which was then the proposed agency to administer the Act, pointed out that this provision in the bills "may result in unintentionally exempting interstate or foreign operations when performed by a carrier * * * engaged in operations solely within any state" (*Id.*, p. 117). The provision did not appear in subsequent drafts of the bills and was never adopted.⁷ In the light of the presence

⁷ The National Association of Railroad and Utilities Commissioners, which traditionally favor the retention of State control over transportation matters, proposed amendments to the bills designed to safeguard the jurisdiction of the States. Significantly, however, the Association's amendments (not adopted) were only to safeguard "purely intrastate commerce, not the commerce that is begun within the State, is carried to the end of a carrier's line, and then proceeds onward to some other State, which is purely

of such a provision in the Motor Carriers Act, its elimination from the Civil Aeronautics Act is a further indication that Congress did not intend to grant a comparable exemption to the interstate operations of intrastate air carriers.

The statement by Senator McCarran, upon which the district court relied for its conclusion that Congress intended that "intrastate carriers, operating solely between points within the state, would not be subject to the economic regulations" (R. 14,648, p. 83), did not relate to economic regulation but to safety regulation. Moreover, Senator McCarran's views as to the limited reach of the Board's power in the safety field were rejected since, as we have pointed out (*supra*, p. 7 ff.), Congress did occupy the field of safety regulation.

Contrary to the statement of the district court (R. 14,648, p. 84) we did not contend there, and we do not contend here, that Congress has occupied the entire field of economic regulation of air carriers. On the contrary, we recognize that there are important areas of economic regulation which have been left to the states.⁸ Our argument rests on the narrower ground

interstate commerce, and is properly subject to the jurisdiction of the Federal Commission. All that is excluded from the jurisdiction of the Federal Commission is that commerce which begins and comes to its end within a State." Hearings before a Subcommittee of the Committee on Interstate Commerce, U.S. Senate, 75th Cong., 1st Sess., on S. 2, pp. 367-368.

⁸ California has been upheld in its assertions of authority to regulate intrastate rates of interstate air carriers. *Western Air Lines v. P.U.C. of California*, 342 U.S. 908 (1952); *People v. Western Air Lines*, 268 P. 2d 723 (Calif., 1954), appeal dismissed 348 U.S. 859 (1954). So far as we are aware, neither the California Courts nor the California Commission assert any power in the State to regulate rates charged for intrastate segments of interstate journeys. See

that here Congress exercised its broad power over interstate commerce sufficiently to reach interstate transportation conducted by intrastate carriers.

This construction of the Act also accords with the Board's settled administrative interpretation. The Board consistently has interpreted the economic regulatory provisions as applying to the traffic involved rather than to the physical operation of aircraft. Thus, in *Canadian Colonial Investigation*, 2 C.A.B. 752 (1941), the Board held that a carrier performing only operational stops within the United States was not engaged in air transportation. Comparing the definition of "air commerce" (Section 1(20), *infra*, p. 23), which specifically refers to "operation or navigation" of aircraft, with Section 1(21) which contains no such provision, the Board held:

"The inclusion of that phrase in the definition of 'air commerce' and its omission from the definition of 'air transportation' very clearly implies that the scope of the latter is not controlled by the element of physical operation of aircraft."⁹

Consistent with this view, the Board has issued a number of certificates covering intrastate operations which form an integral part of interstate air transpor-

People v. Western Air Lines, *supra* at pp. 737, 738.

Several states (but not California) also require that interstate carriers obtain certificates of public convenience and necessity for intrastate transportation performed in aircraft also carrying interstate traffic and crossing state lines.

⁹ Apart from the fact that this construction patently is correct, any other view would cause serious repercussions in the international field. The right to make operational stops and to fly across the territory of other nations is based upon the concept that the nature of the traffic controls rather than the physical operation of aircraft.

tation (see *e.g.*, *Continental A.L. et al., Texas Air Service*, 4 C.A.B. 478 (1943)), and it also regulates the rates charged by carriers for transporting traffic on the intrastate leg of an interstate journey. Similarly, the Board exercises full control over the interstate transportation provided by freight forwarders and other indirect air carriers who do not operate aircraft at all. See *Consolidated Flower Shipments, Inc.-Bay Area v. Civil Aeronautics Board*, 213 F. 2d 814 (C.A. 9, 1954). This construction is entitled to great weight as an interpretation by the agency charged with administering the statute.¹⁰

The fact that the Board has instituted judicial proceedings to enjoin unauthorized interstate operations by an intrastate carrier only once before does not suggest, as the district court stated (R. 14,648, p. 84), that the Board itself entertains doubts as to its jurisdiction. Rather, it reflects the fact that, in view of the general recognition by the air transportation industry that intrastate carriers who engage in interstate air transportation require certification, there has been no need for the Board to institute such proceedings. Moreover, in that prior instance the court implicitly recognized that operations of an intrastate carrier may constitute interstate air transportation under the Act. See *Civil Aeronautics Board v. Canadian Colonial Airways*, 41 F. Supp. 1006 (S.D. N.Y., 1940).¹¹

¹⁰ *National Labor Relations Board v. Hearst Publications*, 322 U.S. 111, 130 (1944); *Unemployment Compensation Commission v. Aragon*, 329 U.S. 143, 153-154 (1946); *American Airlines v. Civil Aeronautics Board*, 178 F. 2d 903, 909, 910 (C.A. 7, 1949).

¹¹ In that case the Board sought to enjoin a carrier from engaging in interstate and foreign air transportation between two points within the State of New York without a certificate. The theory of the Board's case, as stated by the district court (p. 1008), was

Congress, in its statutory definition of air transportation, embodied traditional transportation law concepts under which the intrastate segments of an interstate journey are fully subject to Federal regulation (see *infra*, p. 17). We submit that the district court plainly erred when it held that appellees' interstate transportation activities are exempt from the Board's regulatory jurisdiction solely because appellees' aircraft do not fly beyond the California state line.

II

Appellees Have Engaged in Unauthorized Interstate Air Transportation, and the District Court Erred in Denying the Motions for Preliminary Injunction.

We have shown in Point I, *supra*, that a carrier is engaged in interstate air transportation within the meaning of the Act when it transports property or persons while they are moving or traveling in interstate commerce. We submit that the record in this case shows that a substantial number of appellees' passengers are moving in interstate commerce, and that the

that the carrier's "passengers are using said air line as one leg or portion of an interstate or foreign journey, and that this is sufficient to characterize defendant's business as being interstate in quality, and defendant, therefore, is amenable to the Board." The Board sought an order, pursuant to Rule 34 of the Federal Rules of Civil Procedure, directing the carrier to produce records showing the identity and certain other information concerning its passengers. The court granted the motion, pointing out (*ibid.*) that the "main issue" was whether "defendant's intrastate transportation of passengers, who use the air line as one leg of an interstate or foreign journey, constitutes interstate commerce," and that the information which the Board sought would be "most helpful" to the Board in carrying its burden of establishing the facts as to the nature of the carrier's business.

The action was ultimately terminated by a consent decree which, insofar as Section 401(a) was concerned, enjoined the carrier from conducting interstate, overseas or foreign air transportation without prior certificate authority.

district court therefore erred in denying the motions for preliminary injunction.

It is well settled that when goods are shipped for carriage from a point in one state to a given point in another, they remain in interstate commerce at least until they reach the point "where the parties originally intended that the movement should finally end." *Illinois Central R.R. Co. v. Fuentes*, 236 U.S. 157, 163; *B.&O. S.W. R.R. Co. v. Settle*, 260 U.S. 166, 173-174. Likewise, a trip made pursuant to a ticket providing for transportation by air between a point in one state to a point in another, as is here the case (see *infra*, pp. 18-19), is an interstate trip from beginning to end, including any leg of the trip made between points in the same state. "When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character." *United States v. Yellow Cab Co.*, 332 U.S. 218, 228. See also *United States v. Capital Transit Co.*, 325 U.S. 357, 363.¹²

The record shows that transcontinental "non-scheduled" carriers operating between Burbank, California, and points such as Chicago, Dallas, Kansas City, and New York City utilize appellees' services to provide through transportation to and from other points in California served by appellees but not by the "non-scheds."

¹² An interstate movement begins when the person or goods embark upon the first participating carrier, and terminates at the ultimate destination. *The Daniel Ball*, 10 Wall. 557; *Texas & New Orleans R.R. Co. v. Sabine Tram Co.*, 227 U.S. 111. Cf. *Airlines Transportation, Inc. v. Tobin*, 198 F. 2d 249 (C.A. 4), holding that an airline passenger begins his interstate journey when he boards a limousine destined for the airport.

This service is provided pursuant to operating arrangements between appellees and the "non-scheds," and results in a continuous interstate journey between points in the east and the California points which appellees serve (R. 184, 218, 219, 264, 319, 354, 357).

A passenger enplaning in the east receives a ticket from the transcontinental carrier or its agent for passage from the point of origin to his point of ultimate destination in California, such as Oakland and San Diego, even though that carrier does not itself operate beyond Burbank. (R. 149, 316). When a transcontinental air carrier arriving from the east has passengers aboard destined for such points other than Burbank, the customary practice is for the incoming flight to communicate from the last stop prior to Burbank with the carrier's office or agent in Burbank, who in turn arrange for onward passage on appellees' aircraft. (R. 251, 254, 331, 332). Normally such passengers do not even see the tickets which appellees issue for their transportation beyond Burbank, since the tickets are retained with the manifest to support a billing from appellees to the transcontinental carrier for the cost of the intra-California transportation (R. 158, 195, 242, 262, 275, 332, 351). In many instances, the passengers and/or their baggage have been transferred directly from the aircraft of the transcontinental carrier to appellees' aircraft at Burbank without undergoing any checkout procedure in the Burbank terminal (R. 286, 315). The passenger going beyond Burbank to points such as Oakland or San Diego upon appellees' aircraft pays only the single fare of the transcontinental carrier, which carrier in turn pays appellees for the cost of the "intrastate" leg of the journey (R. 127, 136, 144, 146, 195, 242, 243, 301, 313).

The procedures followed on eastbound flights are not materially different. On these flights from Burbank, passengers in the San Francisco, Oakland, and San Diego areas are issued two tickets, one for passage on appellees' aircraft to Burbank and the other for onward transportation from Burbank via the transcontinental air carrier to the point of ultimate destination outside of California (R. 211, 218, 219, 264, 268, 351). At Burbank the passenger makes his connection with flights to the east. Here again, the through passenger pays only the fare of the transcontinental air carrier from point of origin to point of ultimate destination, and no separate fare is collected for the intra-California portion of the transportation provided by appellee (R. 269).¹³

These facts with respect to ticketing methods, operations procedures, and financial responsibility for the cost of the "intrastate" portion of the interstate movement clearly establish the existence of arrangements between appellees and the transcontinental air carriers for the provision of connecting services at Burbank. Any efforts made by appellees to confine their operations to the carriage of local passengers have been

¹³ The evidence discloses numerous other steps taken by appellee Pacific Southwest during the period covered by the complaint to facilitate passenger connections with flights to the east. Thus, as in the case of westbound flights, on occasion the passengers and their baggage were transferred directly to the transcontinental flights (R. 287); luggage of transcontinental passengers aboard Pacific Southwest's flights was segregated in order to expedite the transfer (R. 285, 287); and Pacific Southwest's flight crews made inflight announcements informing passengers where they should check in at the Burbank terminal to verify their space on connecting carriers (R. 289). Pacific Southwest gives priority to passengers who are carried to Burbank for connections with transcontinental flights (R. 217, 219), and pays the transcontinental air carriers a commission for supplying it with the business (R. 146).

long since discontinued or are freely disregarded (R. 318, 354). Under the circumstances present here, appellees knowingly are transporting passengers who commence or terminate continuous interstate journeys upon appellees' aircraft in California. The fact that these passengers are required to transfer from one aircraft to another at Burbank to accomplish their purpose does not alter the essential character of the transportation as a continuous interstate movement, in which appellees are necessary participants.¹⁴ Appellees are thus engaged in interstate air transportation, and it is a necessary consequence that in the absence of appropriate authority such operations are in violation of law.

We recognize that ordinarily the grant or denial of a preliminary injunction is within the discretion of the trial court. But that doctrine has no applicability where, as here, the injunction was denied not as an exercise of judicial discretion, but due to an erroneous view of the law.¹⁵ The evidence here shows that ap-

¹⁴ "True, their interstate trip was broken at the District [District of Columbia] termini of Virginia buses, when they stepped from one vehicle to another. But in the commonly accepted sense of the transportation concept, their entire trip was interstate." *United States v. Capital Transit Co.*, 325 U.S. 357, 363 (1945). As noted in the *Capital Transit* decision, through ticketing of the passenger is not a necessary ingredient to a finding that an intrastate carrier is engaged in interstate commerce. Cf. *Western Oil Refining Co. v. Lipscomb*, 244 U.S. 346 (1917); *Baltimore & Ohio Railroad Co. v. Settle*, 260 U.S. 166 (1922).

¹⁵ *Hanover Star Mill Co. v. Allen & Wheeler Co.*, 208 Fed. 513 (C.A. 7, 1913), aff'd 240 U.S. 403 (1916); *City of Covington v. Cincinnati N. & C.R. Co.*, 71 F. 2d 117, 119 (C.A. 6, 1934), cert. den., 293 U.S. 612 (1934); *Ring v. Spina*, 148 F. 2d 647, 650 (C.A. 2, 1945), cert. den., 335 U.S. 813 (1948); *Federal Trade Commission v. Rhodes Pharmacal Co.*, 191 F. 2d 744 (C.A. 7, 1951). Cf. *Bowles v. Quon*, 154 F. 2d 72 (C.A. 9, 1946).

pellees have engaged in unauthorized interstate air transportation, and the Board therefore was entitled to a preliminary injunction.¹⁶

¹⁶ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290, 343 (1897); *American Fruit Growers v. United States*, 105 F. 2d 722, 725 (C.A. 9, 1939); *Henderson v. Burd*, 133 F. 2d 515, 517 (C.A. 2, 1943); *Shadid v. Fleming*, 160 F. 2d 752, 753 (C.A. 10, 1947); *Civil Aeronautics Board v. Modern Air Transport*, 81 F. Supp. 803 (S.D. N.Y., 1949), *affd.* 179 F. 2d 622 (C.A. 2, 1950); *Federal Trade Commission v. Rhodes Pharmacal Co.*, 191 F. 2d 744 (C.A. 7, 1951). *Cf. United States v. San Francisco*, 310 U.S. 16, 31 (1940), *reh. den.*, 310 U.S. 657 (1940).

CONCLUSION

The judgments of the District Court should be reversed and the cases remanded with instructions to issue preliminary injunctions.

Respectfully submitted,

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DANIEL M. FRIEDMAN,

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FRANKLIN M. STONE,

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ROBERT L. PARK,

Attorney,

Civil Aeronautics Board,

Washington 25, D. C.

JUNE, 1955.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended, are as follows:

Definitions

Sec. 1 [49 U. S. C. 401]. As used in this Act, unless the context otherwise requires—

(3) “Air commerce” means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any civil airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce.

(10) “Air transportation” means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

(20) “Interstate air commerce”, “overseas air commerce”, and “foreign air commerce”, respectively, mean the carriage by aircraft of persons or property for compensation or hire, or the carriage of mail by aircraft, or the operation or navigation of aircraft in the conduct or furtherance of a business or vocation, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or

possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(21) "Interstate air transportation", "overseas air transportation", and "foreign air transportation", respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Certificate Required

Sec. 401 [49 U. S. C. 481]. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Authority [Board] authorizing such air carrier to engage in such transportation * * *.

Judicial Enforcement

Jurisdiction of Court

Sec. 1007 [49 U. S. C. 647]. (a) If any person violates any provision of this Act, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this Act, the Authority [Board], its duly authorized agent, or, in the case of a violation of section 401 (a) of this Act, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this Act, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this Act or of such rule, regulation, requirement, order, term, condition, or limitation, and enjoining upon them obedience thereto.



Nos. 14648 — 14649

**United States
Court of Appeals**
for the Ninth Circuit

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Business as PACIFIC SOUTHWEST AIRLINES,

Appellee.

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

CALIFORNIA CENTRAL AIRLINES, INCORPORATED,

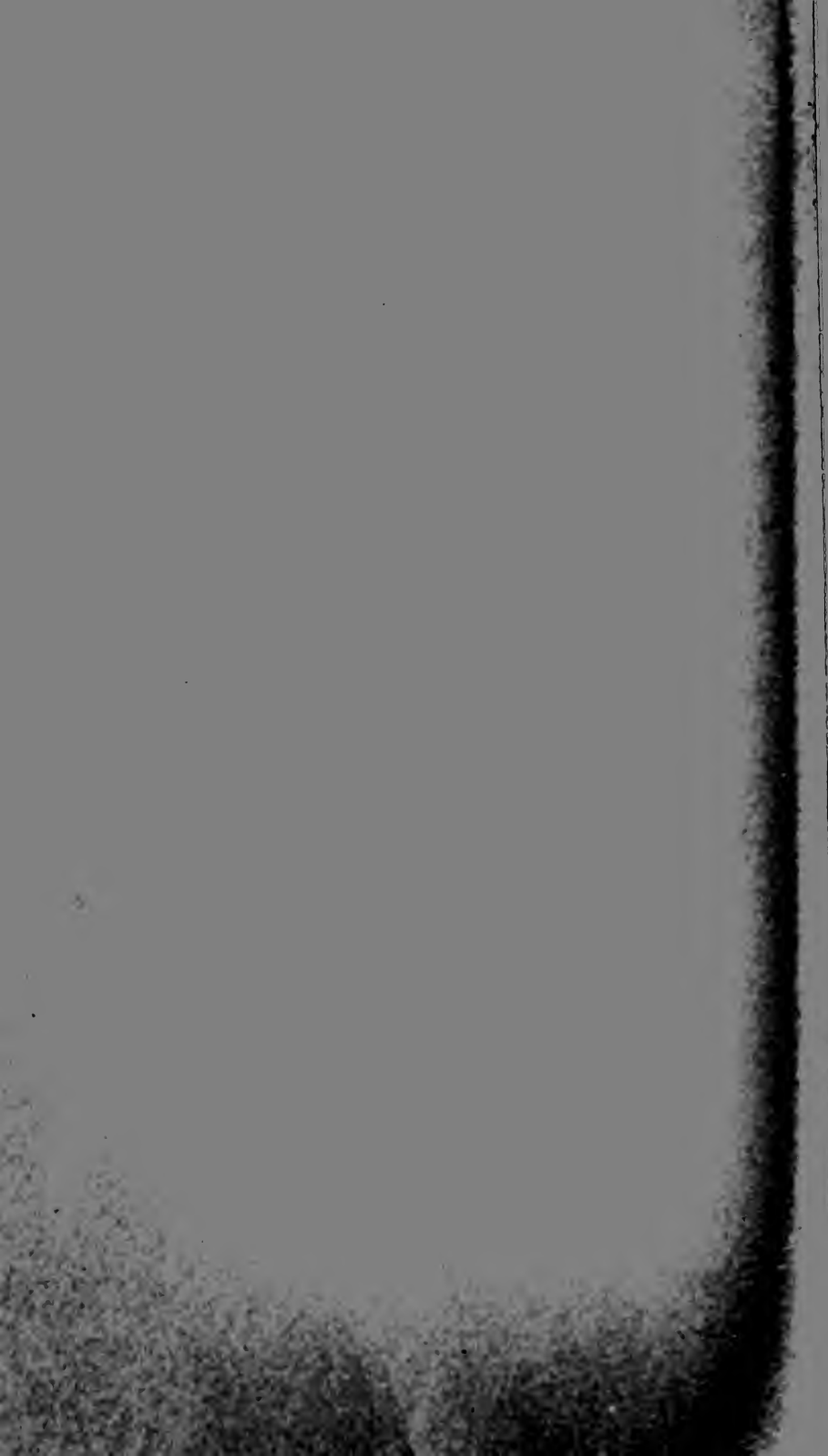
Appellee.

Transcript of Record
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Appeal from the United States District Court for the
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FILE



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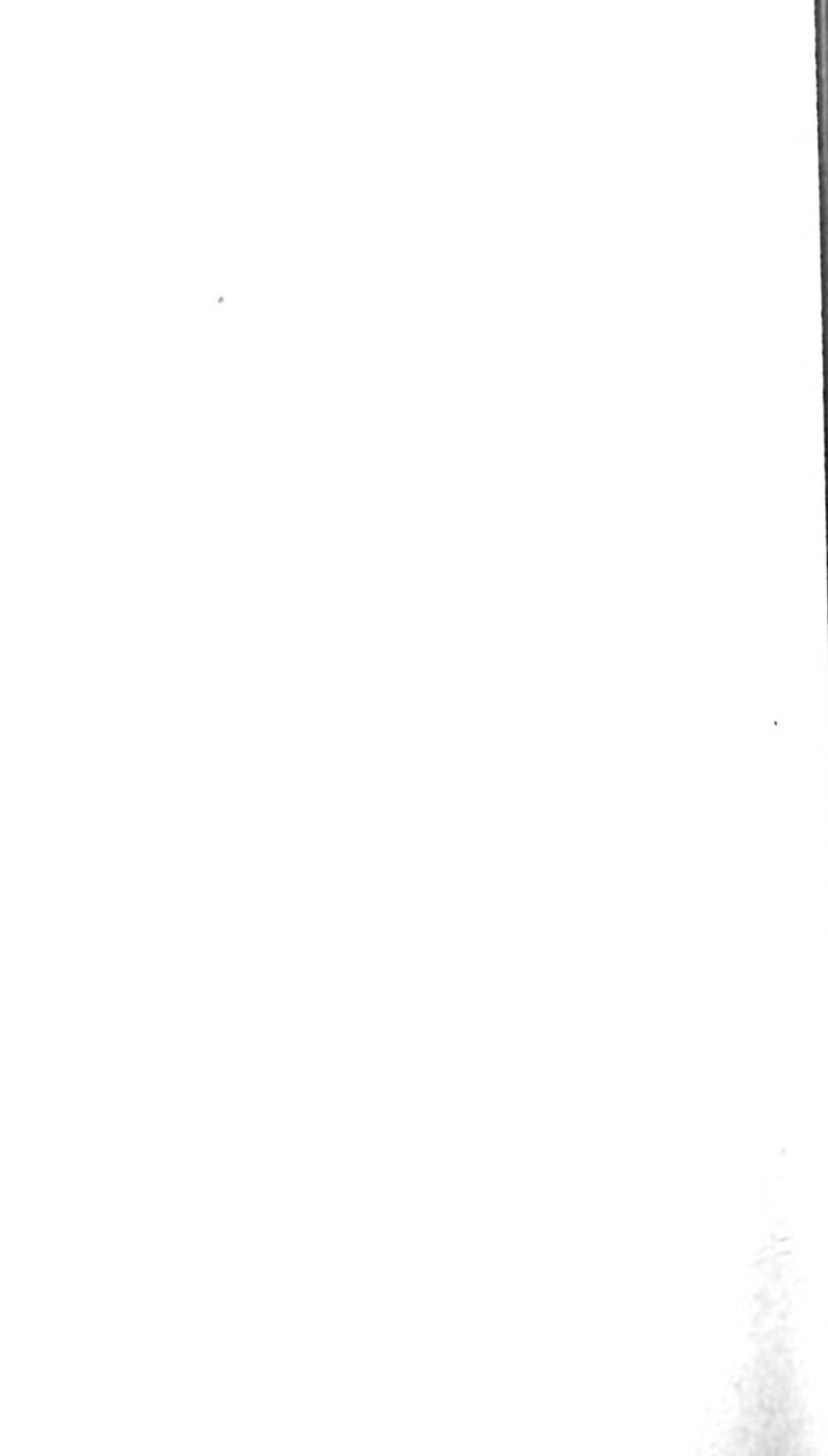
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Appeal from the United States District Court for the
Southern District of California,
Central Division.







In the United States District Court, Southern
District of California, Central Division
No. 16,754-HW Civil

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Busi-
ness as PACIFIC SOUTHWEST AIRLINES,
Defendant.

No. 16,755-HW Civil

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

CALIFORNIA CENTRAL AIRLINES, INC.,
Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Honorable Harry C. Westover, Judge, Presiding.

Appearances:

For the Plaintiff:

LAUGHLIN E. WATERS,

United States Attorney; by

JOSEPH D. MULLENDER,

Assistant United States Attorney; and

JOHN F. WRIGHT,

Office of Compliance, Civil

Aeronautics Board.

For the Defendant, Friedkin Aeronautics, Inc.:

MESERVE, MUMPER & HUGHES, by
LEWIS T. GARDINER, ESQ.

For the Defendant California Central Airlines,
Inc.:

ALFRED C. ACKERSON, ESQ.,
FRANCIS F. QUITTNER, ESQ.

Monday, July 19, 1954, 10:00 A.M.

The Clerk: No. 8, 16,754-HW Civil, Civil Aeronautics Board vs. Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines, hearing on preliminary injunction and hearing motion of defendant for judgment on pleadings, and hearing motion of plaintiff to amend complaint.

No. 9, 16,755-HW Civil, Civil Aeronautics Board vs. California Central Airlines, Inc., hearing on preliminary injunction, hearing motion of defendant for judgment on pleadings.

Mr. Mullender: Ready, your Honor.

Mr. Gardiner: Ready for defendant in the first case.

Mr. Ackerson: We are ready, your Honor.

Mr. Mullender: Your Honor, may I introduce to the court Mr. John Wright for the Civil Aeronautics Board. He has not been admitted to the bar of this court, but has been admitted to the United States Supreme Court and the New York Court of Appeals. He is principally in charge of

this case for the Civil Aeronautics Board. We request the court that Mr. Wright be allowed to argue the matter before the court today.

The Court: He can be admitted to practice here for the purpose of this one case without a general admission. I will be glad to grant your application that he be allowed to appear for this one case. [3*]

Mr. Mullender: Thank you, your Honor.

The Court: Are you ready on this?

Mr. Wright: Ready.

The Court: All right. We will just hold it until we call these other cases.

(Other court matters were taken up.)

The Clerk: No. 8, 16,754-HW Civil, Civil Aeronautics Board vs. Friedkin Aeronautics, Inc.

The Court: I would like to say to counsel in these two cases, there is a question of fact involved. I am not willing to decide questions upon affidavits. I think the parties are entitled to have the witnesses in court so they can be cross-examined. So I am not at all in sympathy with the affidavits on an important case like this.

Mr. Wright: I take it, your Honor——

The Court: Will you speak up, please?

Mr. Wright: From the affidavits, there doesn't seem to be any conflict on the facts.

The Court: If I decide this case upon the affidavits on file, I would immediately decide it against the government. I wouldn't have any hesitancy in doing that upon the affidavits on file.

Mr. Wright: In that case, your Honor——

The Court: I think you better ask for a continuance.

Mr. Wright: No. I was going to suggest, in view of the [4] court's feeling about the questions of fact and about the need of witnesses——

The Court: The question is whether or not the defendants have been engaged in transporting passengers in interstate commerce.

Mr. Wright: That is correct.

The Court: They say they haven't. The affidavits on file say they haven't. I don't know why I should ignore those affidavits. I don't know what the facts are in the case. It may be perfectly true that you may be able to establish that the defendants are in the habit of picking up passengers that are brought here from outside the state, sold tickets as a part of the over-all deal, but I am not going to decide that question upon affidavits.

Mr. Wright: As I understood the affidavits, I think Mr. Friedkin—in Mr. Chambers' affidavit, that is one of the investigators of our office, there is contained an admission by Mr. Friedkin to Mr. Chambers that they carried passengers.

The Court: Here is a case in which I would be virtually putting the defendants out of business if I granted your request for a preliminary injunction. I would be virtually putting them out of business. I am certainly not going to decide an important case like this upon affidavits.

Mr. Wright: If your Honor please, we are not asking the defendants be put out of business. [5]

The Court: You are asking for a temporary restraining order.

Mr. Wright: Just as to the interstate passengers, not as to their intrastate operation.

The Court: If they have been doing this for five years, why is it necessary at this time to come in and say, "It is imperative we have a temporary restraining order"?

Mr. Wright: I don't think they have been doing it for five years. We only claim they have been doing it since some time last year.

The Court: Don't they make an affidavit they are doing the same thing now they have been doing for five years?

Mr. Wright: Well, they do and they don't.

The Court: I am sorry, but I think opposing counsel have a right to cross-examine the witnesses involved. When you bring an affidavit and take away from them the right of cross-examination, I don't like to rule upon anything like that. How are you going to get around the finding of the government agency that they were not engaged in interstate commerce? Do you mean to tell me one government agency can have a hearing, produce all the records, and come to the conclusion that they are not engaged in interstate commerce, and another governmental agency can come in and have another hearing and decide they are?

Mr. Wright: I have read the record in that Mediation [6] Board hearing, and I can understand the decision of the Board, but in that proceeding the Airline Pilots Association is asking the Board

to find that the defendant Friedkin was engaged wholly in interstate commerce. We are not asking that in this proceeding. We are only asking them to stop carrying these passengers who come in and go out of the state via Burbank.

The Court: There are so many facts not resolved, I am not going to grant the motion for summary judgment. I am certainly not going to grant a temporary restraining order. We can set the matter down and have a hearing on the merits and find out what the evidence is and come to a conclusion on the merits.

Mr. Wright: That, I think, is the proper thing to do then, your Honor. When could we have that hearing?

The Court: Where are your witnesses?

Mr. Wright: We only have one here today. The rest of them are in Missouri.

The Court: We can have a hearing on Thursday, if you are ready to proceed to trial. We have got a jury trial that will take two days. I can give you Thursday and Friday on this case. I don't think it will take two days.

Mr. Wright: I don't know whether I can get them here or not.

The Court: Where are the defendants' witnesses?

Mr. Gardiner: In the first case, we could possibly have [7] witnesses that early. You are referring to the hearing on the preliminary injunction?

The Court: No. I am considering a hearing on the merits.

Mr. Gardiner: I don't believe we would be prepared to go to trial that early. It was not anticipated that the trial would be accelerated that much.

The Court: This court will be dark in August. I am starting a motion picture case in September. I don't know when I will be able to get to this otherwise. Unless I can try it this week or next, then I can't set it down at all.

Mr. Gardiner: We do have a motion for judgment on the pleadings which, if granted, would dispose of it.

The Court: I won't grant a motion for judgment on the pleadings.

Mr. Gardiner: That is purely a matter of law.

The Court: No, it isn't. There are a lot of things to be determined. I am not going to grant a motion for judgment on the pleadings or the request for the temporary restraining order until I have heard the facts in this case.

Mr. Gardiner: We feel if all the facts alleged in the complaint are true, if we would assume that for the purpose of the motion, then the statute involved does not give the right to grant the relief here asked.

The Court: Do you want to say something?

Mr. Ackerson: I was merely going to say with respect to [8] the trial date, I think next Thursday or Friday would be rather soon for me to be prepared. I realize the condition of your Honor's docket, but I might point out in that connection that Mr. Wright has come from Washington, D. C.,

and I assume he could come again. My client is in the throes of a reorganization proceeding——

The Court: It seems to me the issue here is a very simple one. I don't know how much work it is going to take to get the witnesses together and produce the testimony. Is the defendant selling tickets in interstate commerce?

Mr. Ackerson: We say no.

The Court: It seems to me that you ought to be able to bring your witnesses here and prove everything you have set forth in the affidavit.

Mr. Ackerson: I am sure we can.

The Court: Why can't you bring your witnesses here then?

Mr. Ackerson: I shall try.

The Court: A week is plenty of time to allow you to go out and contact these witnesses, get an affidavit, and get the affidavit signed and on file.

You know who is going to testify and the government knows who is going to testify. About the only witness the government has got is this investigator. Have you got anybody else besides the investigator? [9]

Mr. Wright: The investigators, and some passengers, your Honor, and the persons the investigators talked to, some of whom we may not be able to locate immediately.

I think we would probably subpoena a lot of records.

The Court: Maybe you ought to have some discovery. Maybe you are not ready to go to trial. If

you get into discovery proceedings, you may not be able to go to trial for six or seven months.

Mr. Wright: That's right. I don't believe we would need discovery proceedings, but I will be perfectly frank on the question of going to trial. This is a purely personal thing. I didn't have a vacation last year.

The Court: You represent the government. If you want a vacation, we will hold the matter in status quo.

Mr. Wright: Unfortunately, I have a place rented at the ocean for two weeks, and I wouldn't want to be here instead of at the ocean.

The Court: If I can't hear it either this week or next, it will go over to September. I don't know what the condition of the calendar will be then.

I will have to work it in some time on short notice, and you will have to come out from Washington again.

Mr. Wright: You say you have time available next week, your Honor? [10]

The Court: I don't know. I am starting a motion picture case. I think maybe I can give you a day or two next week. I don't know how fast I will be able to educate my motion picture people.

Mr. Wright: The government could be ready some time next week if the defendants would be ready.

Mr. Ackerson: We will try to be ready.

Mr. Gardiner: We haven't given consideration to the preparation for trial, but we will do the best we can.

The Court: Why do the cases have to be separated? There is no jury in this case. Don't you think I am able to keep the facts as to the airlines separate?

Mr. Gardiner: There is a tremendously involved set of facts. The facts are not involved, but the evidence is quite involved. I believe there might be some confusion in the two cases being heard together. There are some factual differences between the operations of the two companies.

Mr. Wright: That is primarily as to the method of selling tickets.

Mr. Gardiner: No. I believe the companies each sell the tickets in the same manner, but there are some factual differences, all of which I am not familiar with.

The Court: Why can't we do this? I won't grant a preliminary injunction unless I am satisfied in my own mind that the plaintiff will prevail. Why can't we set this matter [11] down for hearing this week upon the preliminary injunction? Then the government will have to produce all its testimony. At that time, if the government isn't able to establish the facts that they allege, then the case will be dismissed. If we have to go on, maybe I can give you another day or two for you to present your testimony.

Mr. Gardiner: That would be satisfactory with Pacific Southwest.

Would the arguments on the various motions and the legal questions be heard in conjunction with that?

The Court: No. I want to know the facts first, and then I will hear your motions relative to the law and the facts. We will set this matter down for hearing Thursday morning at 10:00 o'clock. Have your witnesses here on the preliminary injunction and we may be able to dispose of the case.

Both cases are now continued to Thursday morning.

(Whereupon, the above cases were continued to Thursday, July 22, 1954, at 10:00 o'clock a.m.) [12]

Thursday, July 22, 1954, 10:00 A.M.

The Clerk: No. 1 on the calendar, 16,754-HW Civil, Civil Aeronautics Board vs. Friedkin Aeronautics, Inc.: Further hearing order to show cause, further hearing motion of defendant and hearing motion of plaintiff.

Mr. Wright: The plaintiff is ready, your Honor.

Mr. Gardiner: Defendant is ready, your Honor.

The Clerk: Do you want me to call both cases, your Honor?

The Court: You may call both.

The Clerk: No. 16755-HW Civil, Civil Aeronautics Board vs. California Central Airlines: Further hearing order to show cause, further hearing motion of defendant for judgment on pleadings.

Mr. Wright: Plaintiff is ready, your Honor.

Mr. Ackerson: Defendant is ready, your Honor.

The Court: We will take up 16,754 first. May I have the file?

The Clerk: Yes, your Honor.

The Court: You may proceed.

Mr. Wright: If I understand your Honor's statement, we are going to make a separate record in each case?

The Court: Well, I do not know. I understood the other day that the two cases could not be tried together, that the issues were different. I do not know what the issues are. [14] I do not know how the issues could be any different.

Mr. Gardiner: If your Honor please, the point we were discussing then, I believe it was contemplated we might be going to trial on the merits and my comments with respect to separation had to do with the trial on merits. I see no particular objection to simultaneously hearing the evidence on the orders to show cause.

Mr. Wright: The reason I inquired, your Honor, is that some of these witnesses will have to testify in both cases.

The Court: All right. We will consolidate the two actions for the hearing upon the order to show cause.

You may call your first witness.

Mr. Wright: Call John W. Chambers.

JOHN W. CHAMBERS

called as a witness by and on behalf of the plaintiff herein, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: John W. Chambers.

Direct Examination

By Mr. Wright:

Q. Mr. Chambers, what is your occupation?

A. I am an Air Transport Examiner with the Civil [15] Aeronautics Board.

Q. And will you briefly relate what your chief duties are?

A. My chief duties are to investigate the practices and procedures of the various airlines, freight forwarders, ticket agencies and anyone connected with air transportation.

Q. In the course of your official duties did you have occasion to come to California in January of 1954?

A. Yes, sir, I did.

Q. And what was the purpose of your trip to California in January of 1954, briefly?

A. The main purpose was to check the interstate operations of California Central Airlines and Pacific Southwest Airlines.

Q. And do you recall when you arrived in California?

A. Yes, sir, I do. It was around 6:30, about 6:30 on January the 26th, 1954.

(Testimony of John W. Chambers.)

Q. What means of transportation did you use to come to California?

A. I came from Chicago on United Airlines. Flight 631.

Q. And to Los Angeles?

A. To Los Angeles.

Q. And what airport did you arrive at?

A. The Los Angeles International Airport.

Q. Approximately how long did you remain in California [16] on that investigative mission?

A. Until on or about February 13th.

Q. During the time that you were here, did you visit the offices of Friedkin Aeronautics, doing business as Pacific Southwest Airlines?

A. Yes, sir, I did.

Q. And can you recall about when that was?

A. Yes, sir, it was on February the 4th and 5th.

Q. And what was your purpose in visiting the offices of Pacific Southwest?

A. I wanted to check the records of Pacific Southwest, their manifests of their flights.

Q. Did you request permission from anyone at the offices of Pacific Southwest to examine their records?

A. Yes, sir, I did.

Q. And from whom did you request the permission?

A. Mr. Friedkin.

Q. Had you met Mr. Friedkin before?

A. No, sir, I had not.

Q. Have you since learned what his capacity is in connection with Pacific Southwest Airways?

A. Yes, sir. He is President.

(Testimony of John W. Chambers.)

Q. Do you recall what day it was that you made this visit to the offices?

A. Yes, sir. To my best recollection it was February [17] the 4th and 5th.

Q. And you spoke to Mr. Friedkin?

A. Yes, sir.

Q. On the occasion that you first spoke to him, I assume that was when you requested permission to examine the records. Do you recall what the conversation was?

A. Well, yes, sir. He asked me of course why I wanted to examine the records, and I told him that we were making a survey of the origin and destination of the passengers on his airline.

Q. And in the course of that conversation did you advise Mr. Friedkin of what your employment was?

A. Yes, sir, I did, and presented my credentials to him.

Q. Did you receive permission to examine the records? A. Yes, sir.

Q. Was space made available in the offices of Friedkin Aeronautics for the purpose of your examination of these records?

A. Yes, sir, it was.

Q. What records did you examine?

A. The flight manifests for the flights of Pacific Southwest Airlines for October, November, and December of 1953.

Q. During the course of your examination of

(Testimony of John W. Chambers.)

these records did you make any photostatic [18] copies? A. Yes, sir, I did.

Q. About how much time did you spend in making the examination?

A. Altogether, close to one working day with part of an afternoon and the following morning.

Q. Before you left the offices of Friedkin Aeronautics did you have any further conversation with Mr. Friedkin? A. Yes, sir, I did.

Q. And when did that conversation occur?

A. On the morning of February the 5th.

Q. And where in the offices of Friedkin did it occur? A. In Mr. Friedkin's office.

Q. Was anyone else present?

A. No, sir, there wasn't.

Q. Will you state to the best of your recollection what you said to Mr. Friedkin and what Mr. Friedkin said to you?

A. Yes, sir. I stated to Mr. Friedkin that I was afraid that possibly the Board might be upset at the number of passengers that he was carrying in interstate commerce. Mr. Friedkin told me that it was his opinion that if he did not fly his aircraft outside of the State of California or if he did not ticket his passengers outside of the state of California that he was not in violaton of any regulations.

Q. Now, I believe you testified previously that you [19] made some photostatic copies of documents. Did you request permission from anyone to make those copies? A. Yes, sir, I did.

(Testimony of John W. Chambers.)

Q. And from whom did you request that permission? A. From Mr. Friedkin.

Q. Now, did you in making these copies make a copy of all of the manifests that you examined?

A. No, sir, I did not.

The Court: How many manifests did you examine?

The Witness: Well, I examined practically all of the flights for the——

The Court: Well, how many? A thousand? A hundred?

The Witness: It would be closer, I would say, to about three hundred.

The Court: All right. How many photographs did you make?

The Witness: Well, altogether I would say about a hundred.

The Court: About a hundred?

The Witness: Yes, sir.

Q. (By Mr. Wright): And some of those photostats that you made are attached to the affidavit which you executed and is filed in this action?

A. Yes, sir.

Mr. Wright: I would like to inquire of the Court whether in referring to these exhibits the Court would like to have [20] each one marked separately.

The Court: Well, I think they ought to be marked. Are these the only copies you have?

Mr. Wright: No, your Honor. Each party has a set of the documents.

The Court: Well, this has been filed with the

(Testimony of John W. Chambers.)

affidavit; however, I have no objection. I will consider the exhibits plus the affidavit if it is satisfactory to counsel. You are making the record here and I want you to make the record as you think it should be made.

Mr. Wright: I think the witness can identify them clearly because in each case each exhibit is marked with the name of the party who makes the affidavit as well as the exhibit number of that set of exhibits attached to the affidavit. So I think the record will be clear.

Mr. Gardiner: We have no objection to the use of the photostats instead of originals, your Honor, but in an affidavit filed when this case was initially heard in May, we indicated that some of the photostats were illegible in our opinion and that you could not make out the writing and in others the pagination of the exhibits did not agree with the affidavits and some of the exhibits were superimposed in the photostat upon other documents to the extent that a picture of the evidence attempted to be portrayed is precluded by their defects. [21]

The Court: What do you mean, when this matter was heard before?

Mr. Gardiner: Well, when it was first called for hearing.

The Court: You mean before the Board?

Mr. Wright: No, before this Court. It was initially scheduled and was continued, and one of the reasons for requesting continuance of this defend-

(Testimony of John W. Chambers.)

ant was that the affidavits were voluminous and not in all intents comprehensive.

The Court: Well, if there is any objection to the exhibits attached to the affidavit I suppose you had better introduce the exhibits in this hearing.

Mr. Wright: Very well, your Honor.

The Court: If you have copies, you may introduce new copies. If you do not have copies, it may be stipulated that the exhibits can be detached from the affidavits for the purpose of being introduced at this hearing. I do not know.

Mr. Wright: I believe that I can tear up my copy of these affidavits.

The Court: All right. You tear up your copy and then introduce it and then we will have it in the order you want it.

Mr. Wright: All right.

Q. (By Mr. Wright): Mr. Chambers, during this investigative [22] trip in January and February of 1954, in addition to the visit which you have already testified to at Friedkin Aeronautics did you visit any other offices of any airlines or ticket agencies in Los Angeles? A. Yes, sir, I did.

Q. And what airlines did you visit?

A. I visited the Great Lakes, U. S. Aircoach and Currey Air Transport.

Q. And will you tell us where Great Lakes' office is located?

A. Yes, sir, I can. It is located in the Lockheed Terminal Building at Burbank.

Q. And with whom did you speak on the occa-

(Testimony of John W. Chambers.)

sion of your visit to Great Lakes Airlines, if anyone?

A. I spoke to Mrs. Ida May Herman.

Q. And did you request from her permission to examine some of the records of Great Lakes Airlines?

A. Yes, sir, I did.

Q. Was that permission granted?

A. Yes, sir, it was.

Q. And did you examine some of the records of Great Lakes Airlines?

A. Yes, sir.

Q. And in the course of that examination did you also make photostatic copies of some of those records? [23]

A. Yes, sir, I did.

The Court: It may be marked for identification as Government's Exhibit 1.

Mr. Wright: Consisting of two photostatic sheets?

The Court: Well, do you want to introduce them as one exhibit or do you want them as separate exhibits?

Mr. Wright: Well, they will have to be received separately but they tie in together. Maybe it would be better to make them one and two.

The Court: All right. Exhibits 1 and 2 for identification only.

Mr. Ackerman: Your Honor, I assume these exhibits have nothing to do with my client.

The Court: I do not assume anything. I do not know anything about them now. After they have been marked for identification they will be shown to you and you can ascertain what they refer to.

(Testimony of John W. Chambers.)

The Clerk: 1 and 2 for identification.

(The photostats referred to were marked Government's Exhibits 1 and 2 for identification.)

The Court: Will you show them to opposing counsel, please, before you start to examine on them?

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 1 for identification, which purports to be a photostatic copy of a document, and ask you whether or [24] not that photostatic copy was made by you?

A. Yes, sir, it was.

Q. Where was it made?

A. In the offices of Pacific Southwest Airlines in San Diego.

Q. And is it a fair and accurate representation of the original?

A. Yes, sir, it is.

Mr. Wright: I will offer the exhibit marked No. 1 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 1.

(The photostat referred to was received in evidence as Government's Exhibit No. 1.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 2 for identification, which purports to be a photostatic copy of two documents in one photostat, and ask you whether or not the photostat was made by you?

(Testimony of John W. Chambers.)

A. Yes, sir, it was.

Q. And where was it made?

A. In the offices of Great Lakes Airlines in Burbank.

Q. That was during the occasion of the examination of records of theirs that you just testified to?

A. Yes, sir.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 2 [25] for identification in evidence.

The Court: It may be received in evidence, Exhibit 2.

The Clerk: Exhibit 2.

(The photostat referred to was received in evidence as Government's Exhibit No. 2.)

The Court: Do you have some more you want marked?

Mr. Wright: Yes, your Honor.

The Court: They may be marked for identification only, Exhibits 3 and 4.

The Clerk: 3 for identification. 4 for identification.

(The photostats referred to were marked Government's Exhibits 3 and 4 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's—

The Court: Will you show it to opposing counsel, please?

Mr. Wright: Oh, I beg your pardon.

(Testimony of John W. Chambers.)

Q. (By Mr. Wright): I show you Plaintiff's Exhibit marked No. 3 for identification, which purports to be a photostatic copy of a document, and ask you whether or not that photostatic copy was made by you? A. Yes, sir.

Q. Where was it made?

A. In the offices of Pacific Southwest Airlines.

Q. And is this a fair and accurate representation of the original document? [26]

A. It is.

Mr. Wright: I offer Plaintiff's Exhibit No. 3 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 3.

(The photostat referred to was marked Government's Exhibit No. 3 in evidence.)

Q. (By Mr. Wright): I show you Plaintiff's Exhibit marked No. 4 for identification, which purports to be a photostatic copy of a document, and ask you whether or not that photostatic copy was made by you? A. Yes, sir.

Q. And where?

A. In the offices of Great Lakes Airlines.

Q. And is it a fair and accurate representation of the original document? A. It is, yes, sir.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 4 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 4.

(Testimony of John W. Chambers.)

(The photostat referred to was received in evidence as Government's Exhibit No. 4.)

Mr. Wright: I request that Plaintiff's Exhibits 5 and 6 be marked for identification. [27]

The Court: They may be marked for identification.

The Clerk: Exhibit 5 for identification and Exhibit 6 for identification.

(The photostats referred to were marked Government's Exhibits 5 and 6 for identification.)

Mr. Gardiner: Just give me the number on the affidavits. That will be sufficient for my purpose. I will not have to inspect these.

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 5 for identification, which purports to be photostatic copy of a document and ask you whether or not the photostat was made by you? A. Yes, it was.

Q. And where?

A. In the offices of the Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the original document? A. It is.

Mr. Wright: I offer Plaintiff's Exhibit No. 5 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 5.

(Testimony of John W. Chambers.)

(The photostat referred to was received in evidence as Government's Exhibit No. 5.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's [28] Exhibit marked No. 6 for identification, which purports to be a photostatic copy of three documents, and ask you whether or not that photostat was made by you?

A. Yes, sir, it was.

Q. And where was it made?

A. In the offices of Great Lakes Airlines.

Q. And is it a fair and accurate representation of the originals? A. Yes, sir, it is.

Mr. Wright: I offer Plaintiff's Exhibit No. 6 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 6.

(The photostat referred to was received in evidence as Government's Exhibit No. 6.)

Mr. Wright: I request that Plaintiff's Exhibit No. 7 be marked for identification. This one consists of two sheets.

The Court: It may be marked.

The Clerk: 7 for identification.

(The photostat referred to was marked Government's Exhibit No. 7 for identification.)

Mr. Wright: And also No. 8 for identification, also consisting of two sheets.

The Court: It may be marked.

(Testimony of John W. Chambers.)

The Clerk: Exhibit 8 for identification. [29]

(The photostat referred to was marked Government's Exhibit No. 8 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 7 for identification, consisting of two pages, which purport to be photostatic copies of documents and ask you whether or not those photostats were made by you.

A. Yes, sir, they were.

Q. And where were they made?

A. In the offices of Pacific Southwest Airlines.

Q. Are they fair and accurate representations of the originals? A. They are.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 7 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 7.

(The photostat referred to was received in evidence as Government's Exhibit No. 7.)

Q. (By Mr. Wright): Now, Mr. Chambers, I show you Plaintiff's Exhibit marked No. 8 for identification consisting of two documents, which purport to be photostatic copies, and ask you whether or not those photostatic copies were made by you? A. They were.

Q. And where were they made? [30]

A. In the offices of Great Lakes Airlines.

Q. Are they fair and accurate representations of the originals? A. Yes, sir, they are.

(Testimony of John W. Chambers.)

Mr. Wright: Offer Plaintiff's Exhibit marked No. 8 for identification in evidence.

The Court: It may be received.

The Clerk: Exhibit 8.

(The photostats referred to were received in evidence as Government's Exhibit No. 8.)

Mr. Wright: I request Plaintiff's Exhibit No. 9 be marked for identification and No. 10.

The Court: They may be marked for identification, 9 and 10.

The Clerk: 9 and 10 for identification.

(The documents referred to were marked Government's Exhibits Nos. 9 and 10 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked for identification No. 9, which purports to be a photostatic copy of a document, and ask you whether or not it was made by you? A. It was.

Q. And where was it made?

A. In the offices of Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the [31] original? A. It is.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 9 for identification in evidence.

The Court: It may be received.

The Clerk: Exhibit 9.

(The photostat referred to was received in evidence as Government's Exhibit No. 9.)

(Testimony of John W. Chambers.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 10 for identification, which purports to be a photostatic copy of a document, and ask you whether or not the photostat was made by you? A. It was.

Q. And where was it made?

A. In the offices of Great Lakes Airlines.

Q. And is it a fair and accurate representation of the original? A. It is, yes, sir.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 10 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 10.

(The photostat referred to was received in evidence as Government's Exhibit No. 10.) [32]

Mr. Wright: And I request that Plaintiff's Exhibits Nos. 11 and 12 be marked for identification.

The Clerk: 11 for identification. And 12 for identification.

(The photostats referred to were marked Government's Exhibits Nos. 11 and 12 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 11 for identification, which purports to be a photostatic copy of a document, and ask you whether or not the photostat was made by you? A. It was.

Q. And where?

A. In the offices of Pacific Southwest Airlines.

(Testimony of John W. Chambers.)

Q. And is it a fair and accurate representation of the original? A. It is.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 11 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 11.

(The photostat referred to was received in evidence as Government's Exhibit No. 11.)

Q. (By Mr. Wright): Now, I show you Plaintiff's Exhibit marked No. 12 for identification, which purports to be a photostatic copy of a document, and ask you whether or not [33] the photostat was made by you? A. It was.

Q. And where was it made?

A. In the offices of Great Lakes Airlines.

Q. And is it a fair and accurate representation of the original? A. It is.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 12 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 12.

(The photostat referred to was received in evidence as Government's Exhibit No. 12.)

Q. (By Mr. Wright): Now, Mr. Chambers, referring to Plaintiff's Exhibit No. 1, for the record can you tell us what that is?

A. Yes, sir. This is a passenger manifest of Pacific Southwest Airlines, Flight 90, on October the 5th from Burbank to San Diego.

(Testimony of John W. Chambers.)

Q. Referring now to Plaintiff's Exhibit marked No. 2, can you tell us what that is?

A. Yes, sir. The top of this exhibit is the transfer manifest prepared by Great Lakes Airlines showing the passengers to be transferred from Burbank to San Diego. The manifest is from Great Lakes Airlines, Flight 410, which arrived in Burbank on the 4th of October—or, rather, which [34] originated in New York on the 4th of October and arrived in Burbank on the 5th.

The Court: May I see that a minute?

The Witness: Certainly.

The Court: You say this is a transfer manifest?

The Witness: Yes, sir.

The Court: Well, this gives the addresses of the passengers, the weight. What is San?

The Witness: That is the airline coach for San Diego.

The Court: S-a-n, San Diego?

The Witness: Yes, sir.

The Court: Originated at Burbank?

The Witness: Yes, sir.

The Court: That is, does that mean passengers originated at Burbank?

The Witness: No, sir, those passengers came into Burbank on Great Lakes Airlines, Flight 410, and were to be transported from Burbank to San Diego.

The Court: Well, now, can you tell me when these passengers arrived at Burbank? Did they have to go into Southwest and purchase a ticket?

(Testimony of John W. Chambers.)

The Witness: Yes, sir, they do. They get a ticket. They do not purchase it.

The Court: You mean it has already been paid for?

The Witness: Yes, sir. The fare from New York to [35] San Diego is the same as the fare from New York to Burbank.

The Court: So when they arrive at Burbank they go over to Southwest——

The Witness: Yes, sir.

The Court: ——and pick up a ticket?

The Witness: They check in, yes, sir. Their ticket has been arranged for them by Great Lakes.

The Court: Well, now, the tickets sold by Great Lakes were sold to Burbank?

The Witness: No, sir, Great Lakes makes the ticket out to the final destination.

The Court: San Diego?

The Witness: San Diego, yes, sir.

The Court: So they buy a ticket to San Diego?

The Witness: Yes, sir.

The Court: And go on Great Lakes to Burbank?

The Witness: Yes, sir.

The Court: When arriving in Burbank they go over to Southwest and pick up a ticket from Southwest?

The Witness: Yes, sir.

The Court: And they do not pay anything for the ticket?

The Witness: No, sir.

The Court: Do you know who pays for it?

(Testimony of John W. Chambers.)

The Witness: Yes, sir.

The Court: How do you know? [36]

The Witness: This is the exchange order which is issued by Pacific Southwest. This number, 5159, is the check that Great Lakes issues to Pacific Southwest in payment of this exchange order.

The Court: All right.

Q. (By Mr. Wright): Now, with further reference, Mr. Chambers, to Plaintiff's Exhibit 1, which is a Pacific Southwest passenger manifest, and with particular reference to the column headed "Agt.," can you tell us what the entries in that column mean?

A. Yes, sir. On the first line S.K.C. stands for Skycoach; the same on the second line. The third and fourth lines indicate Air America. The fifth, sixth and seventh lines have a notation, "Bur." which means that the ticket for those passengers was sold by the Pacific Southwest Airlines agent in Burbank; that is, their ticket agent.

The eighth line indicates that the ticket was sold by Pacific Southwest Airlines in San Diego.

The ninth line, I am not sure what that "A.A.-S.A.N." means in there. The tenth line is "U.S.-A.C.," which stands for U. S. Aircoach. And lines eleven and twelve also indicate the ticket was sold by Pacific Southwest in Burbank.

The Court: May I ask a question? You say U.S.A.C. means United States Aircoach. Does that indicate the ticket was sold by United States [37] Aircoach?

(Testimony of John W. Chambers.)

The Witness: That indicates that that passenger was turned over to Pacific Southwest by U. S. Aircoach.

The Court: With or without a ticket?

The Witness: Well, that particular indication would not indicate which. It may have been possible that U. S. Aircoach sold the ticket to the passenger or it might have been possible that U. S. Aircoach turned the passenger over to Pacific Southwest and paid for the passenger's ticket.

The Court: Well, now, where did this manifest originate? Burbank?

The Witness: Yes, sir.

The Court: Then I take it that U.S.A.C. brought the passenger to Burbank?

The Witness: That I can't—

The Court: You do not know?

The Witness: No, sir, I don't. I could not assume that.

The Court: Well, now, S.K.C.; you say that is Skycoach?

The Witness: Yes, sir.

The Court: What Skycoach?

The Witness: Skycoach is a ticket agency which sells tickets for Great Lakes Airlines and for Currey Air Transport to larger regular carriers.

The Court: S.K.C. is a ticket agency; is that right?

The Witness: Yes, sir.

The Court: And this indicates that the ticket agency [38] sold the ticket?

(Testimony of John W. Chambers.)

The Witness: The ticket agency handles the ticket counter at Burbank for Currey and for Great Lakes.

The Court: And Pacific Southwest?

The Witness: I don't know of any arrangement between them to sell their tickets.

The Court: Well, then, S.K.C. indicates that this was a ticket that originated from the agency? We have above, Agent.

The Witness: Yes, sir.

The Court: S.K.C. was the agent?

The Witness: Yes, sir.

The Court: Sold the ticket?

The Witness: Well, they actually never had the ticket, no, sir. Pacific Southwest Airlines issues the ticket, bills Skycoach for it and the individual airline that actually flew the passengers into California then pays Pacific Southwest.

The Court: Well, now, do I understand that the airplane flies a passenger into Burbank?

The Witness: Yes, sir.

The Court: S.K.C. gives the passenger a ticket?

The Witness: No, S.K.C. tells the passenger to check with Pacific Southwest Airlines for continuing transportation to San Diego. [39]

The Court: Oh, they go to S.K.C. and S.K.C. sends them over to Southwest?

The Witness: Well, I believe those arrangements are made in the airplane by the stewardess. She tells

(Testimony of John W. Chambers.)

them on the way in, so it is not necessary for them to check at Skycoach.

The Court: Oh, it is not necessary for them to check it?

The Witness: No, sir.

The Court: Then they either check at Skycoach or they go over to Southwest and they pick up a ticket?

The Witness: Yes, sir.

The Court: And then Southwest bills the airline for the ticket?

The Witness: Yes, sir.

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit No. 3, which is a Pacific Southwest Airlines manifest, and ask you to compare it with Plaintiff's Exhibit No. 4 and state whether or not some of the names on both of those exhibits are apparently the names on both of those exhibits are apparently the names of the same individuals or the same passengers.

A. Yes, sir, they are. All of the names on Exhibit No. 4 are also on Exhibit No. 3.

Q. And what is Exhibit No. 4? [40]

A. Exhibit No. 4 is the transfer manifest prepared by Great Lakes Airlines.

Q. And does that exhibit also contain a copy of an exchange order? A. Yes, sir, it does.

Q. And with reference now to the exchange order, are there any notations on there which would indicate whether or not payment was made for the transportation covered by that exchange order and

(Testimony of John W. Chambers.)

in what manner? A. Yes, sir.

Mr. Gardiner: Your Honor, I would like to object to this line of questioning on the ground that the exhibits, being in writing, speak for themselves; and, furthermore, that the question calls for——

The Court: Well, now, that is perfectly true. They speak for themselves, but they are Greek as far as I am concerned. Somebody has to explain.

Mr. Gardiner: The questioning has brought forth answers which consist of assumptions, beliefs and probabilities and speculations about which the witness is not necessarily qualified.

The Court: I will allow you when the time comes to interpret these documents for yourself. To me they do not mean anything. They are just documents. Somebody has got to explain them. It may be that there are different [41] explanations. I don't know.

The objection is overruled.

Do you remember the question?

The Witness: Yes, sir, I do.

In the upper righthand corner of the exchange order is the number 5160, which is the check number issued by Great Lakes Airlines to Pacific Southwest Airlines on October 7th, 1953.

The Court: May I interrupt just a moment? You say the check number. You mean the check in payment for the tickets?

The Witness: Yes, sir.

The Court: That is the kind of check you are talking about?

The Witness: Yes, sir.

(Testimony of John W. Chambers.)

The Court: All right. Go ahead.

Q. (By Mr. Wright): Have you finished your answer?

A. I believe I have finished it.

Q. And is there any notation on that exchange order which would indicate any tickets that were issued?

A. Yes, sir, there is. Also in the upper right-hand corner are the numbers 5502-07, which were the ticket numbers issued to the passengers.

The Court: You mean it was the numbers of all the tickets? A ticket was issued to each passenger?

The Witness: Yes, sir. [42]

The Court: And that includes the numbers?

The Witness: Yes, sir.

Q. (By Mr. Wright): And also with further reference to Exhibit 4, Mr. Chambers, in the column headed "Ticket Number" there also appear some numbers there. Are they the numbers of the tickets which are indicated on the exchange order or are they some other tickets?

A. They are another ticket number. They are the ticket numbers of the passengers, of the tickets that were used to fly from their point of origin outside of the state of California into Burbank.

Q. And do those numbers appear on Plaintiff's Exhibit No. 3? A. No, sir.

Q. Do the ticket numbers indicate on the exchange order on Plaintiff's Exhibit No. 4 appear on Plaintiff's Exhibit No. 3?

A. Yes, sir, they do.

(Testimony of John W. Chambers.)

Q. And are they opposite the names of the individuals as they appear on the transfer manifests?

A. They are, yes.

Q. And also with reference to Plaintiff's Exhibit 3, in the lower portion thereof, on the diagonal line there appears the language, "Five Throughs." Can you explain what that means? [43]

A. Yes, sir. That means that there were five passengers aboard the airplane that boarded north of Burbank and were continuing on the same aircraft south of Burbank.

The Court: That is Southwest, is it?

The Witness: Yes, sir.

The Court: May I see that just a minute?

The Witness: Certainly.

The Court: And the other one?

The Witness: Yes, sir.

The Court: Now, with reference to Exhibit 4, do these passengers originate outside the state of California?

The Witness: Yes, sir, they did.

The Court: Where did they originate? Do you know?

The Witness: Not definitely, no, sir; but they would be somewhere between New York and Kansas City.

The Court: And these five passengers' final destination was San Diego?

The Witness: Yes, sir.

The Court: They were flown into Burbank, and

(Testimony of John W. Chambers.)

at Burbank what happened to them? What did they do? Do you know?

The Witness: Yes, sir. I know the usual procedure.

The Court: What is the usual procedure, then?

The Witness: What individual passengers did I can't say; but the usual procedure was to deplane from the Great Lakes Airline flight at Burbank and to go to the baggage claim [44] area, pick up their baggage and then go to Pacific Southwest counter and check in there for their continuing flight to San Diego.

The Court: Well, I understand that when they fly into Burbank planes are unloaded at Burbank; that is, planes from outside the state?

The Witness: Yes.

The Court: Baggage is taken out?

The Witness: Yes.

The Court: And then each passenger has to go and pick up his own individual baggage?

The Witness: Correct, yes, sir.

The Court: And then that passenger, individually, or with the help of a redcap, then carries the baggage over to the Southwest?

The Witness: Yes, sir.

The Court: And then at Southwest they pick up a ticket?

The Witness: Yes, sir.

The Court: Do they buy the ticket?

The Witness: No, sir, they don't.

The Court: Do they pay anything for the ticket?

(Testimony of John W. Chambers.)

The Witness: No, sir, they don't.

The Court: Southwest gives them a ticket; that is, presents them a ticket?

The Witness: Yes, sir.

The Court: And who pays Southwest? [45]

The Witness: The carrier that brought the passengers into Burbank.

The Court: Southwest bills the carriers?

The Witness: Yes, sir, they issue that exchange order.

The Court: And then Southwest carries them down to San Diego?

The Witness: Yes, sir.

Q. (By Mr. Wright): Now, Mr. Chambers, your testimony so far in relation to Plaintiff's Exhibits 3 and 4 has been with regard to the five or five and a half passengers that appear on both Exhibits 3 and 4. By reference to the column headed "Agt." on Plaintiff's Exhibit No. 3, are you able to state whether or not any passengers were carried on that Pacific Southwest flight who were furnished apparently by transcontinental carrier other than Great Lakes? A. Yes, sir.

Q. Will you so state?

A. On lines 1 to 9 the notations N.A.A., which stands for North American.

The Court: Can we have the stipulation that Great Lakes is engaged in transporting passengers in interstate transportation?

Mr. Wright: Plaintiff will stipulate.

(Testimony of John W. Chambers.)

Mr. Ackerson: What is that, your Honor? I am awfully sorry. [46]

The Court: Well, we have here testimony relative to Great Lakes. Are you willing to agree that Great Lakes was engaged in transporting passengers in interstate transportation?

Mr. Ackerson: I assume they were, your Honor.

The Court: Well, I assume they were, too.

Mr. Ackerson: But I do not know. I do not know anything about Great Lakes.

The Court: You don't?

Mr. Ackerson: Goodness, no. Hearsay.

The Court: All right. I might ask the witness.

You have been referring to Great Lakes. What is Great Lakes? Do you know Great Lakes?

The Witness: Yes, sir, I do.

The Court: What is it?

The Witness: It is a large irregular carrier engaged in interstate commerce of passengers.

The Court: Where is the flying from and to?

The Witness: Well, its most used route is from New York to Chicago to Kansas City to Burbank.

The Court: Now, do you know of your own knowledge that they fly that route?

The Witness: Yes, sir, I do.

The Court: All right.

I notice it is 11:00 o'clock and we usually take a [47] midmorning recess. We will now recess until ten minutes after 11:00.

(Brief recess.)

(Testimony of John W. Chambers.)

Q. (By Mr. Wright): Mr. Chambers, I do not recall whether I asked you previously, but on this investigative trip in January and February of 1954, in addition to Great Lakes and Friedkin Aeronautics, which I believe you have already testified you visited, did you visit any other airline offices?

A. Yes, sir, I did.

Q. More than one?

A. Yes, sir, quite a few, although not all of them of course were involved in this particular investigation.

Q. Did you visit the Curry Air Transport?

A. Yes, sir, I did.

Q. And where is their office located?

A. Their office is located in the Great Lakes Airlines hangar at Burbank.

Q. And did you see anyone at that office?

A. Yes, sir, I did. I spoke to Miss Tillie Gamble.

Q. Did you examine any of the records in that office?

A. Yes, sir, I did. I examined their flight manifests for the period from—well, October and November and December of 1953.

Q. And is that the same period that was covered in [48] your examination at the offices of Friedkin Aeronautics?

A. Yes, it was.

Q. And do you know what Curry Air Transport is?

A. Yes, sir. Curry Air Transport is a large irregular carrier.

(Testimony of John W. Chambers.)

Q. And do you know what type of aircraft it operates?

A. Yes, sir. It operates DC-4 aircraft.

Q. And do you know whether or not it was operating during the period covered by your examination?

A. Yes, sir.

Q. And do you know of your own knowledge what points in the United States, if any, it was serving?

A. Yes, sir, I do. It was serving New York, Chicago, Kansas City and Burbank.

Q. In other words, the same route that you have already testified Great Lakes was serving?

A. Yes, sir.

Q. And while in the offices of Curry Air Transport did you make photostatic copies of any documents?

A. Yes, sir, I did.

Q. And what documents did you photostat?

A. I photostated their passenger manifests for their flights, their transfer manifests for passengers to be transferred to points other than Burbank in California and copies of Pacific Southwest Airlines' exchange orders. [49]

Q. Did you make photostats of all such documents that you found in the office of Curry Air Transport?

A. No, sir, I didn't.

Q. What method of selection did you use or what criteria did you use in making the photostats that you did make?

A. Well, as closely as I could I picked the same

(Testimony of John W. Chambers.)

periods that I had already used in the offices of Pacific Southwest Airlines.

Mr. Wright: I request that these documents be marked Plaintiff's Exhibits——

The Court: 13 and 14.

Mr. Wright: ——13 and 14 for identification.

The Clerk: 13 and 14 for identification.

(The photostats referred to were marked Government's Exhibits 13 and 14 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked 13 for identification, which purports to be a photostatic copy of two documents, and ask you whether or not the photostat was made by you. A. Yes, sir, it was.

Q. And where was it made?

A. I would like to refresh my memory on this, but I believe this was made in the offices of Great Lakes Airlines.

Q. At the same time as the previous exhibits? [50] A. Yes, sir.

Q. And is it a fair and accurate representation of the original? A. Yes, sir, it is.

Q. Now, I show you Plaintiff's Exhibit marked No. 14 for identification, which purports to be a photostatic copy of a document, and ask you whether or not that photostat was made by you?

A. Yes, sir, it was.

Q. And where was it made?

A. In the offices of Pacific Southwest Airlines.

(Testimony of John W. Chambers.)

Q. And is it a fair and accurate representation of the original? A. Yes, sir, it is.

Mr. Wright: Plaintiff offers Exhibits 13 and 14 for identification in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 13 and 14.

(The photostats referred to were received in evidence as Government's Exhibits Nos. 13 and 14.)

Mr. Wright: May these three photostats be marked for identification as Plaintiff's Exhibit 15?

The Court: Exhibit 15 for identification.

Mr. Wright: And the single photostat as Plaintiff's Exhibit 16 for identification? [51]

The Court: For identification.

The Clerk: 15 for identification and 16 for identification.

(The photostats referred to were marked Government's Exhibits 15 and 16 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 15 for identification, which purports to be photostatic copies of documents in three sheets and ask you whether or not the photostats were made by you?

A. Yes, sir, they were.

Q. And where was it made?

A. The first sheet was made in the offices of Curry Air Transport. The second sheet was also made in the offices of Curry Air Transport. Pardon

(Testimony of John W. Chambers.)

me. All of them were made in the offices of Curry Air Transport.

Q. Then I show you Plaintiff's Exhibit No. 16 for identification, which also purports to be a photostatic copy of a document, and ask you whether or not that photostat was made by you.

A. Yes, sir, it was.

Q. And where was that made?

A. In the offices of Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the original? A. It is.

Mr. Wright: I offer Plaintiff's Exhibits 15 and 16 [52] for identification in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 15 and 16.

(The photostats referred to were received in evidence as Government's Exhibits 15 and 16.)

Q. (By Mr. Wright): Now, Mr. Chambers, from an examination of Plaintiff's Exhibits 15 and 16 are you able to state whether or not they are in any way related and, if so, what is the relationship?

A. Yes, sir. I notice that four of the names on Exhibit 15 are the same as four of the names on Exhibit 16.

Q. Will you state the names of those four individuals, please?

A. Yes, sir, I will: Krause, two Roseks and Thiebar.

Q. Now, will you state what Exhibit 15 is?

A. The first page of Exhibit 15 is a photostat of

(Testimony of John W. Chambers.)

the passenger manifests of Curry Air Transport, Flight 1510 from Chicago to Burbank.

Q. Have you finished your answer?

A. Yes.

Q. Now, will you state for the record what Plaintiff's Exhibit 16 is?

A. Exhibit 16 is Pacific Southwest Airlines' manifest for Flight 90 on October the 16th from Burbank to San Diego.

Q. Now, I believe you already stated that the names on [53] lines 1, 2 and 3 of Plaintiff's Exhibit 16, that is, Krause and two Roseks, which appear on Plaintiff's 16 also appear on Plaintiff's Exhibit 15. From an examination of Plaintiff's Exhibit 15 are you able to state where these three persons originated their flight?

A. Yes, sir. They originated in Chicago, Illinois.

Q. All three of them? A. Yes, sir.

The Court: I assume they came out to Burbank and disembarked at Burbank?

The Witness: Yes, sir.

The Court: Then what happened after they got to Burbank?

The Witness: Then they went to San Diego on Pacific Southwest.

The Court: And followed the same procedure which you have outlined?

The Witness: Yes, sir.

The Court: That is, they took the baggage off of the plane they were on, walked over to Southwest, picked up the tickets?

(Testimony of John W. Chambers.)

The Witness: Yes, sir.

The Court: And then continued down to San Diego?

The Witness: Yes, sir.

The Court: And Southwest then billed the airplane line for the price of the ticket? [54]

The Witness: Yes, sir.

Mr. Wright: I request that these three photostats will be marked as Plaintiff's Exhibit No. 17 for identification.

The Court: It may be marked 17 for identification.

Mr. Wright: And another photostat No. 18 for identification.

The Court: 18 for identification.

The Clerk: 17 for identification and 18 for identification.

(The photostats referred to were marked Government's Exhibits 17 and 18 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibits marked for identification No. 17—

The Court: Before you get to that, let me ask one question of this witness, if I can. I notice on the various exhibits that you have introduced, particularly on Exhibit 15, there is an exchange order, Pacific Southwest Airlines. There appears in printing "Fare 11.70." 11.70 is crossed out and above it is written in pencil "5.55." Do you know what the

(Testimony of John W. Chambers.)

billing was? Was it for the regular fare at 11.70 or was it for 5.55?

The Witness: Well, sir, you will notice that on the bottom of that exhibit there is a "Burbank" and then there is something crossed off and "San." after it, and that 11.70 was the fare to whatever that is that is crossed off, possibly [55] either Oakland or San Francisco.

The Court: This is not the fare, then, from Burbank to San Diego, 11.70?

The Witness: No, sir, it isn't.

The Court: So they used a schedule of a different fare and crossed out the printing and wrote in the 5.55?

The Witness: Yes, sir.

The Court: Well, do you know of your own knowledge whether that is the regular fare?

The Witness: Yes, sir, I believe it is without tax, the regular fare without tax, San Diego from Burbank.

The Court: Well, they have got the tax here. I think, if I can read it, 53 cents. Then I understand that the billing from Southwest to these airplane companies was at the regular fare?

The Witness: Yes, sir, minus a commission.

The Court: Well, now, they paid the commission to the agent for selling the tickets, I assume?

The Witness: Yes, that's correct.

The Court: Well, now, you testified on one of the exhibits a little while ago that a check was sent.

The Witness: Yes, sir.

(Testimony of John W. Chambers.)

The Court: That is, a check for the fare?

The Witness: Yes, sir.

The Court: I do not remember what exhibit it was, but was [56] that a check for the entire fare, that is, the regular normal fare?

The Witness: Minus the commission that Pacific Southwest paid to, in this instance, Curry Air Transport for turning the passengers over to them.

The Court: Do they pay the regular seller's commission?

The Witness: Yes, sir.

The Court: In other words, if they turned the passenger over to Southwest then Southwest will give them credit for what they would pay a regular ticket agent for selling the ticket?

The Witness: That is correct, yes, sir.

The Court: All right. You may proceed.

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 17 for identification, which consists of three pages of photostats and ask you whether or not those photostats were made by you. A. Yes, sir, they were.

Q. And where were they made?

A. In the offices of Curry Air Transport.

Q. And are they fair and accurate representations of the original? A. Yes, sir.

Q. And I show you Plaintiff's Exhibit marked for identification No. 18, which purports to be a photostatic [57] copy of a document, and ask you whether or not that was made by you.

A. Yes, sir, it was.

(Testimony of John W. Chambers.)

Q. And where was that made?

A. In the offices of Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the original?

A. Yes, it is.

Mr. Wright: I offer Plaintiff's Exhibits marked for identification 17 and 18 in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 17 and 18.

(The photostats referred to were received in evidence as Government's Exhibits 17 and 18.)

Q. (By Mr. Wright). Can you tell us, if you will, Mr. Chambers, and if you know, what Exhibit 17 consists of?

A. Yes, sir. The first page of Exhibit 17 is the passenger manifest of Curry Air Transport's Flight No. 1910 from La Guardia Field, New York, to Burbank.

Page 2 is Curry Air Transport's manifest for the same flight for passengers boarding in Chicago with destination Burbank.

Page No. 3 is the transfer manifest showing the passengers to be transported to San Diego, and at the bottom of that exhibit is the exchange order of Pacific Southwest [58] Airlines.

Q. And are you able to state what Plaintiff's Exhibit No. 18 is?

A. Yes, sir. Exhibit No. 18 is Pacific Southwest Airlines' manifest for Flight 90 on the 19th of October, from Burbank to San Diego.

Q. By reference to Plaintiff's Exhibits 17 and

(Testimony of John W. Chambers.)

18 are you able to state whether or not some of the names of the passengers on those exhibits appear on both exhibits? A. Yes, sir, they do.

Q. Will you state their names, please?

A. Yes, sir; Laux—

Q. As you give the name will you also, if you can, from Exhibit 17 state where the passengers originated?

A. Yes, sir. Mr. Laux, who originated in Chicago; Mr.—if I may, I will spell this—K-r-a-n-c-z-y-k, who also originated in Chicago; Mr. Fournier originated in La Guardia; and Mr. Abalofi originated in La Guardia.

Q. And those persons also appear on Exhibit 18?

A. Yes, sir, they do.

Q. And are there ticket numbers on both Exhibits 17 and 18?

A. Yes, sir, there are.

Q. And do Exhibits 17 and 18 show the same ticket numbers for the trip from Chicago to Burbank and Burbank to [59] San Diego or are they different numbers?

A. They are different numbers.

Q. On page 3 of Exhibit 17 is there anything on that page which would indicate the ticket numbers which appear on Exhibit 18?

A. Yes, sir, there are. At the top of the exchange order are the numbers 4526-29, which are the same numbers as the ticket numbers appearing on Exhibit 18.

(Testimony of John W. Chambers.)

The Court: Before you go to another, I want to ask a question.

Now, when these airplane lines sell a ticket back in New York or Chicago, do they sell the ticket to San Diego or do they sell it to Los Angeles?

The Witness: They sell it to San Diego, sir.

The Court: The ticket reads "To San Diego"?

The Witness: Yes, sir.

The Court: La Guardia to San Diego?

The Witness: Yes, sir.

The Court: Have you seen the ticket?

The Witness: I have.

The Court: Have you any copies of the tickets?

The Witness: No, sir, I don't.

The Court: Have you seen the tickets?

The Witness: I have seen several tickets, yes, sir, and I—— [60]

The Court: They are not sold from La Guardia to Los Angeles?

The Witness: No, sir.

The Court: Or to Burbank? They are sold from La Guardia to San Diego?

The Witness: San Diego, yes, sir.

Q. (By Mr. Wright): Mr. Chambers, during this investigation in January and February of 1954, did you also visit the offices of U. S. Aircoach at Lockheed Terminal? A. Yes, sir, I did.

Q. And will you state, if you know, what U. S. Aircoach is?

A. Yes, sir. U. S. Aircoach is a large irregular carrier.

(Testimony of John W. Chambers.)

The Court: That may be marked 19 and 20 for identification.

The Clerk: 19 and 20 for identification.

(The photostats referred to were marked Government's Exhibits 19 and 20 for identification.) [63]

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 19 for identification, which purports to be a photostatic copy of a document, and ask you whether or not that was made by you? A. Yes, sir, it was.

Q. And where?

A. In the offices of U. S. Aircoach.

Q. And is it a fair and accurate representation of the original? A. It is, yes, sir.

Q. Now I show you Plaintiff's Exhibit marked No. 20 for identification which also purports to be a photostat, and ask you whether or not that was made by you? A. Yes, sir, it was.

Q. And where was it made?

A. In the office of Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the original? A. It is, yes, sir.

Mr. Wright: I offer Plaintiff's Exhibits 19 and 20 for identification in evidence.

The Court: They may be received in evidence, 19 and 20.

(The photostats referred to were received in evidence as Government's Exhibits 19 and 20.)

(Testimony of John W. Chambers.)

Q. (By Mr. Wright): Will you state for the record what [64] Exhibit 19 is?

A. Yes, sir; Exhibit 19 is a transfer manifest of U. S. Aircoach.

Q. Does any date appear thereon?

A. Not on—well, actually a date does not appear on the manifest, no, sir; but through the flight number I can tell that the flight originated on the 4th of October.

Q. And what is Exhibit No. 20?

A. Exhibit 20 is a passenger manifest of Pacific Southwest Airlines on October the 5th for Flight 90 from Burbank to San Diego.

Q. And I believe Exhibit 19 contains the name of one passenger, does it not?

A. Yes, sir, it does.

Q. And does the name of that passenger appear on Exhibit 20?

A. Yes, sir, it does.

Q. And is there a ticket number on Exhibit 20 for that passenger?

A. Yes, sir.

Q. What is the ticket number?

A. The ticket number is 99466.

Q. And does that ticket number appear anywhere on Exhibit 19?

A. Yes, sir, it does. It appears on the exchange order [65] on Exhibit 19.

Q. With reference to Exhibit 19 are you able to state where that passenger, whose name I believe you said was Collin, originated?

A. Not definitely, no, sir. Yes—I take that back. Yes, I can. He originated in Chicago.

(Testimony of John W. Chambers.)

The Court: I want to go back for just a minute. Excuse me. You say the tickets are sold from La Guardia to San Diego, but on the flight out, somebody, the stewardess, told them to go over to Southwest and pick up the ticket to San Diego?

The Witness: Yes, sir.

The Court: Is any written memorandum given?

The Witness: No, sir, there isn't.

The Court: It is just an oral direction?

The Witness: Yes, sir.

The Court: Well, when they get over to Southwest how do they identify themselves?

The Witness: Well, Pacific Southwest is given a copy of the transfer manifest by the originating airline so that they then know who the passengers coming from, in this instance, U. S. Aircoach, will be.

The Court: Now, let's define a term. You have used the term "transfer manifest." What do you mean by transfer? What is the meaning of transfer?

The Witness: That is the name that has been given to [66] these manifests by the carriers and it indicates a manifest that shows the names of the people who are to be transferred from, in this instance, U. S. Aircoach to Pacific Southwest, also in this instance.

The Court: It refers to the transfer from one airline to another?

The Witness: That's correct, yes, sir.

The Court: It does not refer to the transfer from La Guardia to Burbank, for instance?

(Testimony of John W. Chambers.)

The Witness: No, sir. That's correct.

The Court: But from one airline to another?

The Witness: Yes, sir.

The Court: All right.

Mr. Wright: May these two photostats be marked for identification as Plaintiff's Exhibit No. 21?

The Court: It may be marked 21.

The Clerk: 21 for identification.

The Court: 21 for identification only. 21 consists of two sheets.

(The photostats referred to were marked Government's Exhibit 21 for identification.)

Mr. Wright: And I am also asking that another sheet be marked 22 for identification.

The Court: It may be marked.

The Clerk: 22 for identification. [67]

(The photostat referred to was marked Government's Exhibit 22 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked for identification 21, which purports to be two photostatic copies, and ask you whether or not they were made by you?

A. Yes, sir; they were.

Q. And where were they made?

A. In the offices of U. S. Aircoach.

Q. And are they fair and accurate representations of the original? A. Yes, sir; they are.

Q. And I show you Plaintiff's Exhibit marked

(Testimony of John W. Chambers.)

No. 22 for identification, which also purports to be a photostatic copy, and ask you whether or not that was made by you? A. Yes, sir, it was.

Q. And where was that made?

A. In the offices of Pacific Southwest Airlines.

Q. And is it a fair and accurate representation of the original? A. Yes, sir; it is.

Mr. Wright: I offer Plaintiff's Exhibits 21 and 22 for identification in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 21 and 22. [68]

(The photostats referred to were received in evidence as Government's Exhibits 21 and 22.)

Q. (By Mr. Wright): Now, will you state for the record what Exhibit 21 is?

A. Exhibit 21 are passenger manifests—pardon me. Strike that. Are transfer manifests of U. S. Aircoach for the passengers to be transferred from their Flight 108W to Pacific Southwest Airlines for transportation to San Diego.

Q. And what is Exhibit 22?

A. Exhibit 22 is the passenger manifest for Pacific Southwest Airlines Flight 12 from Burbank to San Diego.

Q. And does Exhibit 22 contain the names of the passengers that appear on Exhibit 21?

A. Yes, sir; they do.

Q. And can you tell us what the exchange order that appears on the second page of Exhibit 21 was used for?

(Testimony of John W. Chambers.)

A. Yes. That was used to bill U. S. Aircoach for four passengers' travel from Burbank to San Diego.

Q. And is there any notation or record on Exhibit 21 on the second page there which would indicate how payment was made, if it was made?

A. No, sir.

Q. Can you state from an examination of Exhibit 21 the city of origination of the passengers that appear thereon that also appear on [69] Exhibit 22?

A. Yes, sir; I can. Mr. Gloster and Mr. Kettel originated at La Guardia Field in New York. Mr. Sagen originated in Philadelphia and Mr. George in Chicago.

Q. Now, Mr. Chambers, these exhibits which you have identified and from which you have been testifying in relation to Pacific Southwest, U. S. Aircoach, Curry Air Transport and Great Lakes are some of the photostats that were taken by you during the course of this investigative mission?

A. Yes, sir.

Q. There were more? A. Yes, sir.

Q. Are you able to state whether or not they contain substantially the same information as these that have already been introduced?

A. Yes, sir; they do.

Q. Now, to go back to the earlier part of the testimony, Mr. Chambers——

The Court: Before you go back I have got one other question I want to ask this witness.

(Testimony of John W. Chambers.)

Now, you said a little while ago—I am sorry, but I want to get this piecemeal and I have to go back and get it while I think about it—you said a little while ago that these passengers were told to go over to Southwest after they got to Burbank. No written memorandum was given?

The Witness: That's correct. [70]

The Court: Now, these exchange orders. Were the exchange orders ever given to the passengers?

The Witness: No, sir.

The Court: Where did they originate?

The Witness: The exchange order originates at the ticket counter of Pacific Southwest Airlines.

The Court: You mean to say that the exchange order is made by Pacific Southwest?

The Witness: Yes, sir.

The Court: At the time a passenger comes in?

The Witness: Yes, sir.

The Court: And then it is sent over to the originating carrier?

The Witness: Yes, sir.

The Court: The exchange order says, "To Be Exchanged for Reservation and Flight Ticket at Pacific Southwest Airlines." Now, your testimony is that this exchange order is never given to the passenger?

The Witness: That's right, sir.

The Court: No written memorandum is given to the passenger?

The Witness: No, sir.

(Testimony of John W. Chambers.)

The Court: They are orally told to go over to Pacific Southwest and pick up a ticket?

The Witness: That's right; yes, sir.

The Court: And they never see the exchange orders so far [71] as you know?

The Witness: So far as I know they don't; yes, sir.

The Court: And they never see the exchange order so far as you know?

The Witness: So far as I know they don't; yes, sir.

The Court: They never have it in their possession?

The Witness: Correct. I did see in one instance a ticket that was sold to a passenger in San Diego for passage west, a stamp on the ticket which said, "On Arrival at Burbank Check In at the Office of Caribbean American," and in that case the passenger's route was from San Diego to Burbank, and then the large regular carrier from Burbank to the East; and in that one instance there was a notation on the ticket that he was to check in at the office of Caribbean American, which is a large regular carrier. But in other instances of westbound passengers I have not seen any written notation.

The Court: Well, of course, that is the only documentary evidence we have, the westbound passengers?

The Witness: That's correct.

The Court: And those passengers who originate

(Testimony of John W. Chambers.)

outside the state come into Burbank and then are transferred to San Diego?

The Witness: Yes, sir.

Q. (By Mr. Wright): Mr. Chambers, during the course of your January and February investigation, did you, among [72] other things, go to Lockheed Air Terminal to observe the arrival of westbound transcontinental flights?

A. Yes, sir; I did.

Q. And do you recall any specific occasion?

A. Yes, sir; I do. On the morning of February the 1st I was at Lockheed Air Terminal and observed the arrival of a flight of North American Airlines arrive at Burbank. I observed the passengers deplane and go to the baggage area and pick up their baggage and of that planeload of passengers, twelve then took their baggage to the ticket counter of Pacific Southwest, checked in there, rechecked their baggage and they later boarded a Pacific Southwest Airlines flight for San Diego.

The Court: May I ask a question? How much time elapsed then from the time they arrived until they checked in with Pacific Southwest and took the Pacific Southwest plane?

The Witness: The service was very good, sir. They didn't wait very long; about, I would say, not longer than fifteen minutes.

The Court: Fifteen minutes from the time they got off the plane?

The Witness: From the time they got their baggage. It took them quite some time to get their bag-

(Testimony of John W. Chambers.)

gage, and then fifteen minutes after they checked in at the Pacific Southwest counter the flight was ready to go. [73]

The Court: Then there was no waiting period at all? That is, just the time that was consumed in transporting themselves and the baggage from one plane to the other?

The Witness: Yes, sir; about fifteen additional minutes.

Q. (By Mr. Wright): Did you observe whether or not the passengers were issued any tickets at Lockheed, either by a ticket agent at the North American counter or at the Pacific Southwest counter?

A. Well, none of those passengers went to the North American counter, and at the Pacific Southwest counter they were given identification to board the Pacific Southwest flight.

Q. And do you know what the identification was?

A. No, sir, I don't; but I saw them show something at the gate as they went through.

Q. Do you know whether it was a ticket?

A. No, sir; I don't.

Q. Now, I believe you testified previously that you arrived at Los Angeles International Airport on January 26, 1954?

A. Yes, sir.

Q. And about what time?

A. It was close to 6:30 in the evening.

Q. And I believe you testified, for the record, from [74] where did you come?

A. From Chicago.

Q. And by what means?

(Testimony of John W. Chambers.)

A. On United Airlines, Flight 631.

Q. Did you meet any other member of the Board staff at Los Angeles International Air Terminal that evening?

A. Yes, sir; I did.

Q. And who was it?

A. It was Franklin Oelschlager.

Q. And what is his capacity with the plaintiff?

A. He is the Chief Investigator of the Office of Compliance.

Q. And had you traveled from Chicago with him?

A. No, sir; I hadn't. It was quite a coincidence. I was surprised to see him. He had just arrived from St. Louis.

Q. Do you know how he traveled to Los Angeles International Airport?

A. Yes, sir; I do. He came on TWA.

Q. Did either you or Mr. Oelschlager at that time arrange for any onward transportation from Los Angeles to any other point?

A. Yes, sir; I did. I went to the ticket counter of Pacific Southwest Airlines and asked for information regarding their next flight to San Diego. [75]

Q. This was Los Angeles International Airport?

A. Yes, sir; it was.

Q. And what counter?

A. The counter of Pacific Southwest Airlines.

The Court: Do they maintain an office there?

The Witness: No, sir; they don't.

The Court: What do you mean by counter, then? Did they have a Pacific Southwest Airlines sign?

(Testimony of John W. Chambers.)

The Witness: No, sir. I was confused and I am sorry. But it was the office of California Central Airlines.

The Court: Oh, California Central Airlines.

Mr. Ackerson: May I make a suggestion, your Honor? It is about noon, and I would like to make it at this time if I may. Your Honor, at this stage it is perfectly all right with us to conduct the two hearings at the same time, but I do think the evidence ought to be somewhat departmentalized as we go along. Might I suggest for clarity of the record that this present witness finish with Southwest Airlines before he starts on Cal Central? Otherwise we are going to have——

The Court: Are you getting ready to start on Cal Central?

Mr. Wright: As far as this witness is concerned, I have finished with Pacific Southwest.

The Court: Well, I think we ought to finish up with one of the companies at a time so there won't be any confusion. [76] I think the suggestion is good.

May I inquire about your progress? How much time do you anticipate it is going to take to present your witnesses?

Mr. Wright: I had hoped, your Honor, by a streamlining process, to complete it today. However, we were unable to serve subpoenas on two witnesses. The Marshal was unable to locate them, but I believe they will be served this afternoon or tomorrow morning. With the exception of those

(Testimony of John W. Chambers.)

two witnesses I think I can complete the rest of my case this afternoon.

The Court: Well, now, have you any other witness relative to Southwest other than this witness?

Mr. Wright: Yes, I have, your Honor; several.

The Court: Several other witnesses?

Mr. Wright: That's right.

How long do you anticipate it will take to put on your evidence?

Mr. Gardiner: We have four witnesses, your Honor. I believe we can put them on in half a day.

The Court: You do not think there is any question that we can finish tomorrow?

Mr. Ackerson: Well, I don't know. I have two or three witnesses. I will put on as few as possible, your Honor. I have three or four available and I intend to call about two [77] of them. I think we can do it in less than half a day. I mean, I can do my part of it in less than half a day.

The Court: Well, perhaps we had better reconvene at 1:30. That's what I am trying to find out. It is a question of time. It would be just as easy to reconvene at 1:30 as it would be at 2:00.

Mr. Wright: It is perfectly satisfactory with the plaintiff.

The Court: All right.

Mr. Wright: I have one question, your Honor. As I understand your previous statement, you wish to conclude the case separately against each defendant?

The Court: Well, I would think so. In other

(Testimony of John W. Chambers.)

words, I think Southwest should cross-examine this witness relative to Southwest before you proceed with the other matter.

Mr. Wright: In that case, I would just like to request permission. I am through with this witness as far as Pacific Southwest is concerned, but I would like to recall him for more direct in connection with the other case.

The Court: All right. Then Pacific Southwest can cross-examine right after lunch.

Mr. Gardiner: Thank you, your Honor.

The Court: We will now take a recess until 1:30 o'clock this afternoon.

(Whereupon at 12:00 o'clock an adjournment was taken until 1:30 o'clock p.m. of the same day.) [78]

Thursday, July 22, 1954—1:30 P.M.

JOHN W. CHAMBERS

resumed the stand and, having been previously first duly sworn, was examined and testified further as follows:

The Court: You may cross-examine.

Cross-Examination

By Mr. Gardiner:

Q. Mr. Chambers, when you visited the offices of Pacific Southwest Airlines in San Diego for the purposes of your investigation, did you receive the co-operation of the company representatives?

(Testimony of John W. Chambers.)

A. Yes, sir; I certainly did.

Q. Did they make available to you all the documents and records which you requested?

A. Yes, sir; they did.

Q. I believe you testified that you requested the flight manifests of Pacific Southwest Airlines for the fourth quarter of 1953? A. Yes, sir.

Q. Approximately how many manifests did they furnish you?

A. There was about a drawer full in a regular transfer [79] file cabinet.

Q. That would be a drawer full, three feet deep, would you say?

A. Yes, sir. If I remember correctly that entire drawer was filled with manifests for that quarter.

Q. And do you review those manifests?

A. A great number of them, yes, sir.

Q. Approximately how many?

A. Well, I would say as a round guess about three hundred of them.

Q. I think you testified you made photostats of a hundred of them?

A. Approximately, yes, sir.

Q. There was a good deal of testimony directed today to the designation Skycoach. Is that the full name of a company or concern, do you know?

A. I believe the name of it is Skycoach Airlines Agency, Inc.

Q. Skycoach Airlines Agency?

A. Yes, sir.

Q. I believe you testified that is the ticket agency

(Testimony of John W. Chambers.)

and not a carrier? A. Yes, sir.

Q. And are you familiar with Safeway Aircoach Agency? A. Yes, sir; I am. [80]

Q. Is that an agency? A. Yes, sir.

Q. And I believe you testified that North American Airlines is also an agency?

A. North American Airline Agency Corporation, Inc., is an agency, yes, sir.

Q. And I believe at that time there was also an American Air Bus Agency?

A. Yes, there was.

Q. That was also a ticket agency, not a carrier?

A. Yes, sir.

Q. Do you know if all of those agencies are still in business in Burbank?

A. I don't believe all of them are, no, sir.

Q. Do you know which ones are no longer operating?

A. As of the present date I couldn't say. I do know that the last time I was in California that American Air Bus was no longer operating as such.

Q. Do you know if Safeway Aircoach is operating at present in Burbank?

A. The last information I had they were, yes, sir.

Q. What was the date of that information?

A. Well, I know that they had—the gentleman who was their representative at one time was at the Terminal when I was there in January. Whether he actually was operating or [81] whether they had flights coming in or not, I couldn't say.

Q. In testifying with respect to one of the ex-

(Testimony of John W. Chambers.)

change orders, that on Exhibit 13, the designation SKC appears in the box, "Agent's Validation," and there is a designation in the upper right-hand corner of a number and a date. I believe you testified that that was the date of payment of the sum represented by an exchange order: is that correct?

A. It was the date of the check.

Q. Yes. And to whom was that payment made?

A. To Pacific Southwest Airlines.

Q. And who was it paid by?

A. By Great Lakes Airlines.

Q. Great Lakes Airlines. Not Skycoach?

A. Great Lakes Airlines, as I understood it from Mrs. Herman, yes, sir.

The Court: As you understood it from whom?

The Witness: Mrs. Herman. She is the Secretary-Treasurer of Great Lakes.

Q. (By Mr. Gardiner): Did you see the check?

A. No, sir; I didn't.

Q. Are you familiar with the way the defendant, Pacific Southwest Airlines, pays its commissions to ticket agencies? A. I believe I am, yes, sir.

Q. Is it your understanding—— [82]

A. Pardon me. I would like to get the question straight, if I may. Do you mean agencies other than the ones here involved?

Q. No.

The Court: He means ticket agencies generally.

The Witness: Well, I don't know Pacific Southwest's procedure with all ticket agencies.

(Testimony of John W. Chambers.)

Mr. Gardiner: Well, I withdraw that question, then.

Q. Are you familiar with the activities of the ticket agents and agencies of whom you spoke this morning? A. Yes, sir.

Q. Do they sell tickets on only certain carriers which they represent or do they sell tickets on other carriers?

A. They sell tickets for only carrier which they represent.

Q. Do you know whether or not these ticket agencies of which we are speaking sell tickets on Pacific Southwest Airlines?

A. In some instances, yes, sir.

Q. I don't follow that.

A. For instance, if I may give a for instance, Skycoach Agency in San Diego sells Pacific Southwest tickets.

Q. Are you familiar with the fact that you can buy a ticket from that agency in San Diego to San Francisco on Pacific Southwest? [83]

A. Yes, sir.

Q. And, correspondingly, a return trip from San Francisco to San Diego? A. Yes, sir.

Q. When Skycoach sells a ticket for a flight on Pacific Southwest Airways, do you understand who receives the commission on the sale of that ticket?

A. Originally, yes. Yes, sir.

Q. Do you understand that the ticket agent as an agent receives a commission for the sale of the ticket? A. Yes, sir.

(Testimony of John W. Chambers.)

Q. And is it your understanding that the carrier who may transport the passenger does not receive a commission for selling a ticket?

A. I do not know that the carrier does not or that the representatives of the carrier do not. No, sir; I do not know.

Q. From your observations at Lockheed Air Terminal at Burbank have you observed any non-scheduled transcontinental air carrier as distinguished from travel agencies maintained ticket offices or counters in the lobby?

A. That is a difficult question to answer. The name of the agency generally appears above the ticket counter, yes, sir.

Q. Thank you. Is it your understanding that Great [84] Lakes carries or operates flights between points in California in addition to its transcontinental flights? A. Yes, sir.

Q. Is it your understanding that Great Lakes upon occasion continues its incoming transcontinental flights to points such as Oakland and San Diego? A. Yes, sir.

Q. And is it your understanding that North American Airlines or the carriers, the tickets of whom are sold by North American Airlines ticket agency, also continue flights to points beyond Burbank in California? A. Yes, sir.

Q. And do you have the same understanding with respect to outbound flights, namely, that those nonscheduled carriers also have flights originating in San Diego or Oakland which come to Burbank?

(Testimony of John W. Chambers.)

A. I know of none originating in San Diego, sir; but Oakland, yes, I do.

Q. As far as you know the flights go to San Diego and the irregular carriers return empty then?

A. No, sir. I haven't testified that I am aware of any of the flights of irregular carriers continuing north of San Diego.

Q. Are you familiar with the fact that the Curry Air Transport also maintains flights which continue from [85] Burbank to Oakland?

A. Yes, sir.

Q. And that North American Airlines maintains flights from Burbank to Oakland, carriers?

A. Carriers represented by North American Airlines.

Q. Represented by North American Airlines?

A. Yes.

Q. When you inquired of Curry Air Transport as to their flight manifests during the fourth quarter of 1953, approximately how many were offered for your inspection at Burbank?

A. There was about three-quarters of a file drawer of manifests.

Q. About two feet or so? A. Yes, sir.

Q. And did you review those manifests?

A. Yes, sir; I did.

Q. Did a number of those manifests indicate that the passengers listed thereon were continuing their flight from Burbank to Oakland on Curry Air Transport after having come in from out of state?

A. Yes, sir.

(Testimony of John W. Chambers.)

Q. And was there a substantial number of such manifests which showed that type of transportation? A. Yes, sir; there were. [86]

Q. I believe you testified this morning, Mr. Chambers, that the Skycoach ticket agency in arranging for the transportation of passengers from Chicago and Kansas City to Burbank and other points in Los Angeles sometimes utilizes local carriers in California to take them to their ultimate destination in California.

A. (Witness nods affirmatively.)

Q. Did you discuss that subject with representatives of Skycoach? A. Yes, sir.

Q. And when were those discussions held and with whom?

A. On January the 25th at the Skycoach ticket counter at Midway Airport in Chicago with Mr. John Davy.

Q. And did Mr. Davy tell you that a passenger boarding a plane at Chicago for which he sells those tickets could be told when he boarded the train which carrier would take him from, say, Burbank to Oakland? A. Yes, sir; he did.

Q. And did he say that they furnished a ticket on that carrier to the passenger at Chicago?

A. No, sir; he didn't.

Q. Did he tell you the name of the carrier which the passenger would use to go from Burbank to Oakland? A. Yes, he did.

Q. What was that? [87]

A. Pacific Southwest.

(Testimony of John W. Chambers.)

Q. Did he state that the lines on which he sold tickets also ran shuttle flights to Oakland?

A. He said that he did not know how the passengers got to Oakland.

Q. You just testified, I believe, that he told you they went on Pacific Southwest?

A. San Diego.

Q. Did you discuss that subject with the representative of Skycoach at Burbank?

A. This subject of how—

Q. Which carrier would be utilized for the intra-state passage? A. Yes, sir.

Q. Did that individual tell you, as Mr. Davy had, that at the time the flight left Chicago a new carrier would be utilized for the California transportation?

A. Well, I didn't ask that specific question of the person to whom I was speaking, no, sir.

Q. You did not discuss that subject?

A. No, sir. When the determination is made as to which carrier shall be used between Burbank and San Diego it would probably vary in the first instance and I didn't ask the question of exactly when the decision was made.

Q. Well, did you receive any information that indicated [88] that that decision was not made until shortly before the interstate carrier arrived at Burbank?

A. I received no definite information to that effect, no, sir.

Q. Let me ask a question: Do you know of any

(Testimony of John W. Chambers.)

other carrier that transported passengers from Lockheed to San Diego, that is, passengers who come in on an interstate carrier? Do you know of any other local carrier that transported like Southwest?

The Witness: Well, I made no—found no instances of the interstate carriers that I checked where Southwest Airlines had been used or any other carrier other than the two involved here today.

The Court: Well, those are the only two that you know anything about?

The Witness: That's correct. In some isolated instances I believe that ships of other irregular carriers were used to transport their passengers from Burbank to either San Diego or to Oakland or San Francisco.

The Court: But as far as you know the carriers in question used either one of the two defendants who are in court today?

The Witness: That's correct, yes, sir.

The Court: Did both of the defendants serve San Diego?

The Witness: Yes, sir; they do. [89]

Q. (By Mr. Gardiner): Did your interrogation of representatives of the carrier operating under the Skycoach designation result in your receiving information that sometimes one of those carriers continued its own flight to Oakland?

A. Yes, sir.

(Testimony of John W. Chambers.)

Q. Then did they indicate the proportion of the California passengers who were transported on those shuttle flights as distinguished from either of the defendant carriers?

A. That is percentage proportion?

Q. Yes.

A. No, sir. The determination, according to them, was dependent upon the number of passengers they had to transport to Oakland.

Q. In other words, if there was a sufficient amount of passengers to warrant, say, the use of a DC-3, they would be transported on one of their own carriers' planes?

A. If the DC-3 were available, yes, sir.

Q. Do you know whether U. S. Aircoach is presently operating at Burbank?

A. I am of the opinion they are not operating out of Burbank.

Q. Did any of the representatives of these travel agencies with whom you discussed this question mention the [90] name of an individual by the name of Blackwell as a carrier of passengers from Burbank to Oakland?

A. No, sir.

Q. I believe you testified that you conversed with Mrs. Herman, Great Lakes Airline?

A. Yes, sir.

Q. Did not Mrs. Herman tell you that sometimes it is not possible to designate the carrier for the California transportation until after the interstate carrier has arrived at Burbank or has come within thirty minutes of landing at Burbank?

(Testimony of John W. Chambers.)

A. She didn't mention that, no, sir.

Q. She didn't. Did any of the other individuals with whom you discussed this question indicate that the selection of the carrier was not made until approximately that time?

A. Well, there was an indication to that effect, yes, sir, particularly with the carrier that did not fly as close to schedule as some of the others. Of course, they would have to wait until they saw what time their aircraft was going to arrive in order to make arrangements for the continuing portion of the passengers' flight.

Q. These incoming carriers by very definition arrive at varying hours, do they not?

A. Some of them do, yes, sir. [91]

Q. And is it not a fact that there are sometimes delayed flights on the nonscheduled carriers coming into Burbank so that there are arrivals, let us say, in the afternoon instead of at 9:00 a.m., as you have indicated?

A. That's correct, yes, sir.

Q. Then the selection of a carrier to provide transportation within the state of California and the selection of a flight would not always be possible eight or ten hours in advance of a passenger's arrival, would it?

A. It would be set up, as I gather, from the regular routine of the carrier as to what his provisions were. Of course, as far as the number of passengers are concerned who are to be turned over and the reservations having been made, it is necessary that they wait until the flight has left its desti-

(Testimony of John W. Chambers.)

nation next prior to its arrival in Burbank before they can make any reservations.

Q. I take it from that that the substance of your answer is generally in the affirmative; it would not always be possible to determine which flight of a California carrier would be utilized?

A. Specifically, the answer to your question, of course, is, Yes; but to qualify it, in most instances, particularly North American and the North American carriers and the Great Lakes and the Curry would know what time their flight is going to arrive every day in Burbank. [92]

Q. The manifests issued by these irregular carriers are prepared when? A. At—

Mr. Wright: Just a minute. Could we clarify that? As to which manifests?

Mr. Gardiner: Manifests covering the transcontinental passage.

Mr. Wright: The original manifests?

Mr. Gardiner: Yes.

The Witness: Well, in most instances of the carriers that I have observed the manifest is made up prior to the time that the passengers who have made reservations are intended to check in. Then at flight time, after it is determined how many passengers actually have shown up to claim their reservations, the additional names of passengers who are not there for the flight are crossed off.

Q. (By Mr. Gardiner): And when is the manifest on the California carrier made up from your observation? A. I have no knowledge.

(Testimony of John W. Chambers.)

Q. You did not check those dates?

A. I didn't check the time, no, sir. I have seen no one from either California Central or Pacific Southwest make up a flight manifest.

Q. I believe you testified this morning that one of the manifests of Pacific Southwest Airlines, which contained [93] no information at the top, nevertheless contained sufficient information to determine when it was made up. Do you recall that testimony?

A. No; that was not quite the testimony. The testimony was that I could tell the date of the flight by the flight number. You see, the flight number is made up of the number of the month and the number of the day that it departs from its originating station. The flight number, if I remember correctly, was 108, and from 108 you can know that the flight originated on the 8th of October.

Q. That, you say, applies to the flights of Pacific Southwest Airlines?

A. No, sir; of the irregular carriers.

Q. Your testimony this morning, I believe, pertained to that of Pacific Southwest manifests which contained no information? A. No, sir——

Mr. Wright: I do not recall that testimony. If it was in connection with this specific exhibit, I think it ought to be produced.

Mr. Gardiner: I think it is immaterial. I will abandon that line of interrogation.

Q. Generally speaking, would you say that the manifest of the California passengers was made

(Testimony of John W. Chambers.)

up one day after the date of the manifest on the transcontinental carrier? [94] A. Yes, sir.

Q. And this transfer manifest to which you made reference, when would that be prepared?

A. It has been prepared before the flight of the interstate carrier arrives in Burbank on the aircraft.

Q. Do you know how much before?

A. It is between the last stop before arrival in California and its arrival in California.

Q. Were you told of any instances in which it is prepared by the agency at the Burbank Terminal?

A. I believe in some instances that is done, yes, sir.

Q. Do you know whether that is the case more often than not?

A. No; I don't know which is more often the case.

Mr. Gardiner: I have no further questions, your Honor.

The Court: Any other questions?

Mr. Wright: I have one, your Honor.

Redirect Examination

By Mr. Wright:

Q. Do you know whether or not Lockheed Air Terminal has any policy regarding the rental of ticket counter space at Lockheed Air Terminal to ticket agents?

A. Yes, I do. Lockheed has a policy not to rent space to ticket agencies. [95]

(Testimony of John W. Chambers.)

Mr. Wright: That is all.

The Court: You may step down.

Mr. Wright: Pardon me, your Honor. Are we to proceed now with P.S.A., or is this witness going to be permitted to testify as to California Central?

The Court: I presume we had better proceed with this witness while he is on the stand and proceed with the other.

Mr. Gardiner: Your Honor, could I have one question on recross?

The Court: All right.

Mr. Gardiner: I was waiting for that last point brought out on redirect.

Recross-Examination

By Mr. Gardiner:

Q. Notwithstanding this policy to which you have just made reference, is it not a fact from your observation that there are a number of ticket agencies selling transcontinental space on large, irregular carriers presently operating in Burbank?

A. That again is a difficult question to answer because the people who are appearing at those ticket counters and are representing the irregular carriers, I am not familiar with from whom they receive their paycheck.

Q. You did testify earlier, I believe, that as [96] of last fall there were several agencies operating in Burbank?

A. At—

Q. Lockheed Air Terminal?

(Testimony of John W. Chambers.)

A. At the terminal. What I testified was that the name of the agency now is permitted to hang over the ticket counter.

Mr. Gardiner: Thank you. That is all, your Honor.

Direct Examination

By Mr. Wright:

Q. Mr. Chambers, to return again to the day of your arrival in January in California, I believe you said it was January 26th? A. Yes.

Q. And you came on United Airlines?

A. Yes, sir.

Q. From where? A. Chicago.

Q. And that was in the International Airport?

A. Yes, sir.

Q. And at International you met another representative of the Plaintiff's Office of Compliance?

A. Correct, sir.

Q. Whose name was——

A. Oelschlager, Franklin Oelschlager. [97]

The Clerk: Is this the other case?

Mr. Wright: That's right.

The Clerk: California Central.

Mr. Ackerson: I wonder if we could separate these Cal Central exhibits by letter.

The Clerk: Well, your Honor, there are two different case numbers. Now, on the Exhibit tag I will put the number of the case, 16755, Civil Aeronautics vs. California Central, Plaintiff's 1.

Mr. Ackerson: Thank you.

(Testimony of John W. Chambers.)

Mr. Wright: And may these two photostats be marked as Exhibit 1?

The Clerk: For identification.

The Court: It may be marked Exhibit 1 for identification.

(The photostats referred to were marked Government's Exhibit 1 for identification.)

Q. (By Mr. Wright): Mr. Chambers, after you met Mr. Oelschlager, did you purchase transportation from Los Angeles to San Diego?

A. Yes, sir; I did.

Q. And was Mr. Oelschlager with you at the time? A. Yes, sir.

Q. Did he also purchase transportation?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit marked No. 1 for [98] identification, which purports to be two photostatic copies of documents, and ask you whether or not the originals of those, which are a part of the original affidavit, are documents which you purchased for transportation to San Diego?

A. Yes, sir.

Q. And it was purchased from whom?

A. From the agent on duty at the California Central Airlines counter.

Q. Where? A. International Airport.

Q. Did you have any conversation with the agent? A. Yes, sir; I did.

Q. Was there one agent or more than one agent?

A. The first time that I contacted the ticket

(Testimony of John W. Chambers.)

counter there was one agent there, and the second time there were two.

Q. And the first time you went to the ticket counter did you buy the ticket then or later?

A. No, sir; I didn't. The first time I went to the ticket counter I just got information concerning their next flight to San Diego.

Q. Did you request a reservation?

A. No, sir; I didn't. I just got the information. I requested the reservation later.

Q. And you say you returned to the ticket counter later? [99]

A. Yes, sir.

Q. The same day?

A. Yes, sir.

Q. And approximately how long after your first visit?

A. I would presume about an hour.

Q. And was Mr. Oelschlager with you?

A. He was with me the second time, yes, sir.

Q. While you were at the counter on the second visit, did you inquire or ascertain the names of the agents who were at the counter?

A. Yes, sir; I did.

Q. And how did you learn that information?

A. Well, one of the agents called the other agent, Winslow, and we asked—I asked the second agent what his name was, and he said Kenny.

Q. And from which agent did you make the purchase?

A. From Agent Kenny.

Q. At or before or during the time you were making the purchase, did you have some conversation with the agents?

A. Yes, I did.

Q. Was Mr. Oelschlager present?

(Testimony of John W. Chambers.)

A. Yes, sir; he was.

Q. Can you state what you recall of that conversation?

A. Well, the first time that I went to the ticket counter I said that I had just arrived from Chicago on [100] United Airlines and was anxious to get to San Diego and asked if they could tell me when their next flight was and if there was space available; and the agent told me that the next flight was at 9:25, if I remember correctly, and that there was space available on it.

A second time when I went back to the ticket agency to make the reservation, I told the agent on duty, who was Kenny at that time, that I had run into a buddy in the terminal building who had just come in from St. Louis on TWA and he was anxious to go to San Diego, too, and asked him to make two reservations for us on the next flight.

Q. This was at the time you made the purchase or reservation?

A. This was at the time we made the purchase and the reservation also.

Q. Did both of the ticket agents, Kenny and Winslow, as far as you know, hear your statement that you had just come in from Chicago?

A. Yes, sir; they had. And then after we had purchased the ticket and were waiting for the arrival of the flight we discussed with the agent our trips from Chicago and Mr. Oelschlager discussed his trip with the agent from St. Louis. We mentioned several things about the weather and about

(Testimony of John W. Chambers.)

the snow en route and we also talked of the aircraft and how we enjoyed the flight. [101]

Q. Did either one of the agents say anything to indicate to you that you might be engaged in interstate air travel? A. No, sir.

Q. Did they ask for your address?

A. No, sir.

The Court: Mr. Wright, let me see if I understand your position. It is your contention, is it, that if a party buys a ticket from Chicago to New York or Philadelphia and comes to Los Angeles and disembarks from a plane here in Los Angeles and goes to a local carrier who transports within the state that that local carrier in transporting that passenger is then engaged in transporting passengers in interstate traffic?

Mr. Wright: That is our position, your Honor.

The Court: Then it is your position also that the local carrier must ascertain and make certain that the passenger who wants accommodations has not within a reasonable time concluded a trip from outside the state?

Mr. Wright: Yes, for their own protection.

The Court: Isn't that throwing quite a burden upon the local carrier?

Mr. Wright: Well, I think the evidence will show that at one time they were doing just that.

The Court: Well, I am asking you now. I want to know [102] what your position is. Now, this witness has described a typical experience. I expect it happens a great many times. A person buys a

(Testimony of John W. Chambers.)

ticket from New York to Los Angeles; when he gets here, he wants to go to Oakland or San Francisco or El Centro.

Mr. Wright: That's right.

The Court: He goes to a local carrier, buys a ticket. The local carrier sells it.

Mr. Wright: If it is a continuation of his original trip to his original destination.

The Court: Well, now, original destination. He bought a ticket to Los Angeles.

Mr. Wright: You are referring to this witness?

The Court: No. I am just supposing a person buys a ticket to Los Angeles and when he gets here he decides to go to San Diego.

Mr. Wright: If that happened, I wouldn't say it was interstate air transportation, but the vast majority of the cases that we are concerned with here——

The Court: Then, you mean, the passenger has to have an intent when he starts transportation to go on beyond Los Angeles?

Mr. Wright: That is right, your Honor, as evidenced by the transportation. What the intent of the passenger is.

The Court: How is a local carrier to know what the [103] intent of the passenger is?

Mr. Wright: By the ticket.

The Court: Well, a man gets off the plane. He goes over to Southwest and says, "I have just come from New York. I want to go down to San Diego." Now, how does the local agent say, "What was

(Testimony of John W. Chambers.)

your intent when you left New York? Was it your intent to go to San Diego or was it your intent to stop here in Los Angeles?"

Mr. Wright: That is right, your Honor. The purpose of this particular testimony and the transportation involved is in part to show that there is no screening or check.

The Court: No what?

Mr. Wright: Screening or check, at least at the present time, on the part of these two defendants as to whom they carry.

The Court: Then it is your contention that these local carriers have to set up an information bureau and screen their passengers when they come in to find out where they came from, when they arrived and what their intent was **when they started?**

Mr. Wright: No. If they do that, that is up to them. It is our contention that they should not carry interstate passengers, and if it was an occasional or casual thing we would not be here today. But I think that after it is in ninety-nine per cent of our testimony will—— [104]

The Court: Well, let's assume that it is not a casual matter. A person is buying a ticket in Chicago, from Philadelphia, Kansas City or New Orleans to Los Angeles and they arrive either at Burbank or arrive at the International. Now, after they arrive, within a reasonable time, let's say a couple of hours, three hours—I don't know what a reasonable time is—they then purchase a ticket to

(Testimony of John W. Chambers.)

San Diego or to Oakland, San Francisco or El Centro. Now, you contend that the trip from Los Angeles to Oakland or San Diego or El Centro is a continuation of that interstate transportation?

Mr. Wright: That is a part of our contention in this case, your Honor.

The Court: All right. You may proceed.

Q. (By Mr. Wright): Will you tell us now, Mr. Chambers, what occurred subsequent to the purchase by you and Mr. Oelschlager of the tickets from the defendant, California Central?

A. Yes. Well, about 10:00 o'clock our flight arrived and we boarded the flight and took off and flew to San Diego.

The Court: On that ticket?

The Witness: Yes, sir.

Mr. Wright: Plaintiffs offer the exhibit marked for identification.

The Court: It may be received in evidence as Exhibit 1. [105]

The Clerk: Exhibit 1.

(The photostats referred to were received in evidence as Government's Exhibit 1.)

The Court: Let me ask just one other question: You paid \$5.55 for your ticket?

The Witness: Plus tax, yes, sir.

The Court: Plus tax?

The Witness: Yes, sir.

Mr. Wright: I request that these two documents

(Testimony of John W. Chambers.)

be marked as Plaintiff's Exhibit No. 2 for identification.

The Court: It may be marked Exhibit 2 for identification.

The Clerk: Exhibit 2.

(The photostats referred to were marked Government's Exhibit 2 for identification.)

Mr. Wright: And a single sheet as Exhibit No. 3 for identification.

The Court: Exhibit 3 for identification.

The Clerk: Exhibit 3 for identification.

(The photostat referred to was marked Government's Exhibit 3 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 2 for identification, which purports to be two photostatic copies of documents, and ask you whether or not those photostats were made by you? [106]

A. Yes, sir, they were.

Q. And where were they made?

A. In the office of Curry Air Transport.

Q. And that was during the visit which you have testified about this morning?

A. Yes, sir.

Q. And are they a fair and accurate representation of the originals?

A. Yes, sir.

Q. Now I show you Plaintiff's Exhibit No. 3 for identification, which purports to be a photostatic sheet including two documents, and ask you whether or not that is a photostat that was made by you.

(Testimony of John W. Chambers.)

A. Yes, sir.

Q. And where was that made?

A. In the offices of Curry Air Transport.

Q. And is it a fair and accurate representation of the original? A. It is, yes, sir.

Mr. Wright: I offer Plaintiff's Exhibits 2 and 3 for identification in evidence.

The Court: They may be received.

Mr. Ackerson: If your Honor please, I would like to make an objection to this Exhibit 3 containing those two documents. [107]

The Court: Are you objecting to Exhibit 2?

Mr. Ackerson: No, No. 2 is all right.

The Court: Exhibit 2 may be introduced in evidence.

Mr. Ackerson: Exhibit 3 here purports to be a document photostated by Mr. Chambers at Curry Air Transport. Now, the top part of that exhibit is Cal Central's billing to its ticket agency, Skycoach. I do not know whether it has any relation to this bottom part or not. This document is not our document. I do not know what it means. We admit that this top part of it is our billing to Skycoach Agency, but how it got in Curry Air Transport or anything else—I object to it.

The Court: We do not have a jury in this case. The objection is overruled. If it is not material, it will be ignored by the Court.

It may be received and marked Exhibit 3.

The Clerk: Exhibits 2 and 3.

(Testimony of John W. Chambers.)

(The photostats referred to were received in evidence as Government's Exhibits 2 and 3.)

Q. (By Mr. Wright): Now, Mr. Chambers, will you tell us what the two sheets of Exhibit 2 consist of?

A. Yes, sir. It is the passenger manifests of Curry Air Transport Flight No. 311 from La Guardia to Burbank, and sheet No. 2 is passenger manifests for the same flight from Chicago to Burbank. [108]

Q. And can you tell us what the documents contained in Exhibit No. 3 are?

A. Yes, sir. The top of the manifest is the billing of California Central Airlines for five passengers to San Diego addressed to the Skycoach Agency, Lockheed Air Terminal, Burbank, California.

The Court: Will you keep your voice up? I doubt very much whether people at the counsel table can hear you.

The Witness: I am sorry, sir.

Q. (By Mr. Wright): And the rest of that exhibit?

A. The bottom part of the exhibit is the transfer manifest showing the names of the passengers to be transferred to California Central Airlines for continuing transportation to San Diego.

Q. And the names that appear on Exhibit 3 also appear on Exhibit 2? A. Yes, sir, they do.

Q. Let me ask you again, Mr. Chambers, par-

(Testimony of John W. Chambers.)

ticularly with reference to Exhibit 3: From what source did you secure the originals of which that is a photostatic copy?

A. From the offices of Curry Air Transport.

Q. I have forgotten. Did you testify this morning as to whom you talked to at Curry Air Transport?

A. No, sir, I didn't.

Q. Will you tell us now? [109]

A. I talked to Miss Tillie Gamble.

Q. And is she the one who furnished you these documents? A. Yes, sir.

Q. With reference to the handwritten entries that appear on Exhibit 3 on both the upper and lower portions, No. 1728, underneath that 11-4-53; do you know what that represents?

A. Yes, sir. That is the check number of Curry Air Transport in payment for the five passengers billed on the invoice which is pictured here, and the date is the date of the check.

Q. Do you know whether or not there is any company or organization at Lockheed Air Terminal known as Skycoach Agency?

A. No, sir, I don't.

Q. But these documents were in the files of Curry Air Transport? A. Yes, sir.

The Court: May I have those a minute?

The Witness: Yes, sir.

The Court: May I ask this witness a question?

The Witness: Yes, sir.

The Court: Or two. These five passengers originated outside of the state?

(Testimony of John W. Chambers.)

The Witness: Yes, sir, they did. [110]

The Court: And they were carried to Lockheed by whom?

The Witness: By Curry Air Transport.

The Court: And at Lockheed they were carried from Lockheed to San Diego by California Central?

The Witness: Yes, sir.

The Court: And California Central then presented a bill to the Skycoach Agency?

The Witness: Yes, sir.

The Court: You say you don't know of any agency designated as Skycoach?

The Witness: I do of an agency designated Skycoach, yes, sir, but not at the Lockheed Air Terminal.

The Court: But not at Lockheed?

The Witness: No, sir.

The Court: And you found this statement in the offices of Curry?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Wright): Do you know whether or not the name Skycoach appears over the counter at Lockheed Air Terminal?

A. Yes, sir, it does.

Q. And is there any other name that appears at the same counter?

A. Yes, sir, the name of Great Lakes Airlines appears [111] there.

(Testimony of John W. Chambers.)

Q. And do you know whether Curry Air Transport appears at the counter?

A. Not to my recollection, it doesn't; no, sir.

Mr. Wright: May those two photostats be marked as Exhibit No. 4 for identification?

The Court: It may be marked as Exhibit 4.

The Clerk: Four for identification.

(The photostats referred to were marked Government's Exhibit 4 for identification.)

Mr. Wright: And this single sheet as Exhibit 5 for identification?

The Court: Exhibit 5 for identification.

The Clerk: 5 for identification.

(The photostat referred to was marked Government's Exhibit 5 for identification.)

Q. (By Mr. Wright): Mr. Chambers, I show you Plaintiff's Exhibit marked No. 4 for identification, which purports to be a photostatic copy of two documents, and ask you whether or not the photostat was made by you? A. Yes, sir.

Q. And where?

A. At the offices of Curry Air Transport.

Q. And is it a fair and accurate representation of the original? [112] A. Yes, sir, it is.

Q. I show you Plaintiff's Exhibit marked No. 5 for identification and ask you if I asked you the same questions as I did regarding 4 for identification would your answers be the same?

A. They would.

(Testimony of John W. Chambers.)

Mr. Wright: I offer Exhibits 4 and 5 for identification in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 4 and 5.

(The photostats referred to were received in evidence as Government's Exhibits 4 and 5.)

Q. (By Mr. Wright): Will you state what Exhibit 4 is?

A. Yes, sir. Exhibit 4, page No. 1, are portions of two passenger manifests of Curry Air Transport's Flights 1611, one from Philadelphia to Burbank and the other from La Guardia to Burbank; and page 2 is a passenger manifest for the same flight from Chicago to Burbank.

Q. And will you state what Exhibit 5 is?

A. The top of Exhibit 5 is an invoice from California Central Airlines addressed to Skycoach Agency, dated November 17, 1953, stating on the face, "To bill you for Burbank-San Diego tickets." And the bottom is the transfer manifest, transferring passengers from the Curry Air Transport flight to the flight of California Central Airlines. [113]

Q. And do the names that appear on the transfer manifest, a part of Exhibit No. 5, also appear on Exhibit No. 4?

A. Yes, sir, they do.

Q. Exhibit No. 5, particularly the upper portion, which is the California Central invoice, was it in the same condition as it appears in that photostat when you took it from the files or when it was handed to you?

A. Yes, sir.

(Testimony of John W. Chambers.)

Q. I make reference to what appears to be a line through Skycoach Agency.

A. That was on there at the time, sir.

Q. At the time you received the documents?

A. Yes, sir.

Mr. Wright: I have no further questions at this time.

The Court: Before you start your cross-examination perhaps we had better take our afternoon recess. We will now recess for fifteen minutes.

(Brief recess.)

Mr. Ackerson: Your Honor, would you prefer that we use the rostrum?

The Court: Well, it is up to you. You will probably be more at ease if you stand or walk around. [114]

Cross-Examination

By Mr. Ackerson:

Q. Mr. Chambers, what was the date you arrived in Los Angeles on this trip?

A. January the 26th.

Q. And you traveled on a United Airlines ticket, I believe?

A. Yes, sir.

Q. And I believe you stated you originated that ticket in Chicago?

A. Well, I had flown from Washington the day before.

Q. Yes, it started in Washington.

Do you have a copy of that ticket with you?

(Testimony of John W. Chambers.)

Now, is this a copy of the ticket that you came on from Washington, D. C.?

A. Yes, sir, it is.

Q. And that is the copy that was in your affidavit, is it not? A. Yes, sir.

Q. Now, Mr. Chambers, can you read what is in this designation space? Is that what you call it?

A. Yes, sir. Well, I don't know whether I can read it or whether it is because I know what it is; but it is from Washington to Chicago to Los Angeles to San Diego.

Q. Now, there is a notation over here "Open." Is that an open ticket? [115]

A. Originally when I left Washington the only part that reserved space was from Washington to Chicago.

Q. And when you left Chicago where did you reserve space on United?

A. From Chicago to Los Angeles.

Q. Then when you got in here with this open designation on the ticket you could have taken this ticket to United, Lockheed, and continued on to San Diego, couldn't you?

A. I came in at International and I could have used that ticket to go to San Diego, yes, sir.

Q. And you could have transferred to another certified line out there, Western, and gone on to San Diego, could you not?

A. Yes, sir, I could have.

Q. And instead of that you walked out of the TWA building—I believe that is where you landed,

(Testimony of John W. Chambers.)

was it not? A. Well, United.

Q. United? A. Yes, sir.

Q. And you walked out of that building to the right, facing the right way, into the California Central Building; is that right?

A. Yes, sir, that's correct.

Q. And when you got into the California Central Building, you bought a separate ticket from California Central [116] to go to San Diego?

A. Yes, sir.

Q. And you paid the regular price of the ticket including the tax? A. Yes, sir.

Q. The same as anyone else?

A. That's correct, yes, sir.

Q. And that is your Exhibit No. 1, I take it? Exhibit No. 1 is that separate ticket and your gate pass from California Central?

A. Yes, sir, correct.

Q. Now, let's refer to these other exhibits for a moment. Government's Exhibit No. 3, it says on this billing to Skycoach? A. Yes, sir.

Q. That was one separate paper, wasn't it?

A. Yes, sir, it was.

Q. And it shows paid 1723, 11-4-53?

A. Yes, sir.

Q. Did you see that check?

A. No, sir, I didn't.

Q. You don't know whether that was a Skycoach check?

A. I was told that it was a Curry Air Transport check.

(Testimony of John W. Chambers.)

Q. But you did not see the check?

A. No, sir. [117]

Q. And you don't know whether the check was to Skycoach, then, do you?

A. No, sir, I don't.

Q. So you didn't mean to imply that Curry or Courier or whatever the name is paid Cal Central for the ticket? You don't know, do you?

A. Well, I was told that the check went to California Central, yes, sir.

Q. But you did not see the check?

A. No, sir, I didn't.

Q. Now, what is this check notation down here?

A. That is the same notation that is on the bill, paid 1723, 11-4-53.

Q. In connection with this, did you see any separate checks for the commission here?

A. No, sir.

Q. Curry's check was less commission, then, wasn't it? A. Yes, sir.

Q. If this was Curry's check?

A. That is correct, yes, sir.

Q. And these were two separate pieces of paper which you found in Curry's file? A. Yes, sir.

Q. And you don't know whether these two pieces of paper amount to nothing more nor less than an accounting [118] between Curry and its ticket agent, Skycoach, do you?

A. I was told that the check was made out to California Central Airlines.

(Testimony of John W. Chambers.)

Q. But you don't know whether or not these documents amount to any more than just what I stated, an accounting record between the ticket agent and Curry? A. Well——

The Court: Well, he doesn't know anything about it except the record itself. The records speak for themselves.

Mr. Ackerson: Well, the records in connection with who paid what to whom is not clear.

The Court: It just says it is paid. It does not say whom it is paid by or whom it is paid to.

Mr. Ackerson: That's right.

Q. (By Mr. Ackerson): You say the name of the ticket agent at Cal Central's name was Kenny? Is that a nickname or a first name or was he introduced as Mr. Kenny?

A. No, sir. When I asked him his name, all he said was "Kenny." Now, I don't know whether that is his first or last name.

Q. With whom were you having this conversation about the weather? With your partner, Oelschlager, or did our ticket agent out there actively converse with you?

A. We actively conversed with the ticket agent, both Kenny and Winslow, both of them. [119]

Q. Both Kenny and Winslow?

A. Yes, sir.

Q. Did you offer your United ticket in exchange for a Cal Central ticket? A. No, sir.

Q. When you came back, how did you come back from San Diego?

(Testimony of John W. Chambers.)

A. We came back on a California Central Airlines flight.

Q. From whom did you get the ticket?

A. From California Central Airlines.

Q. Did you have any conversations down there when you bought that ticket?

A. Well, just the normal conversation you have when you pick up a ticket, yes, sir, questions regarding the next departure time of the flight.

Q. And you bought a ticket from San Diego to Burbank; is that right?

A. Yes, sir.

Q. Did you tell the ticket agent you were going on an interstate flight?

A. No, sir, we didn't.

Q. Do you suppose he could have found out if you had not told him?

The Court: Well, that is speculation now. We have not [120] got time to speculate.

Mr. Ackerson: I apologize.

The Court: Let's get the facts.

Mr. Ackerson: I apologize, your Honor.

Q. (By Mr. Ackerson): Now, how many of these documents such as Exhibits 3 and 4, in other words, these billing exhibits, did you examine out at Curry's?

A. Just the ones that are photostated.

Q. Were there others?

A. No, sir.

Q. Similar?

A. (Witness shakes head negatively.)

Q. So these are all the documents of this type you found out at Curry's?

A. Yes, sir.

(Testimony of John W. Chambers.)

Q. And that accounted for the transfer of five passengers. Well, the record will speak for itself.

Now, Mr. Chambers, you stated, I believe, that you did see a Skycoach ticket office sign out at Lockheed, did you? A. Yes, sir.

Q. And you know, I believe, that they do maintain an office and telephone out there regularly, don't you?

A. There is a number listed in the phone book, yes, sir. I am aware of that. [121]

Q. I think Stanley 7-2626 or something; isn't that right? A. That sounds familiar.

Q. So that there was no implication in your statement that they were inactive or the sign had been left there by mistake or anything of the sort, was there? A. No, sir.

Mr. Ackerson: I think that is all, your Honor.

Redirect Examination

By Mr. Wright:

Q. Mr. Ackerson just asked you about a Skycoach ticket office at Lockheed Air Terminal at Burbank. I think I previously had asked you about a sign, meaning Skycoach. Were you referring in answering his question to an office or to a sign?

A. A sign.

Mr. Wright: That is all.

(Testimony of John W. Chambers.)

Recross-Examination

By Mr. Ackerson:

Q. Where was the sign, Mr. Chambers?

A. It is over a ticket counter to the left of the entrance as you come in the building at Lockheed.

Mr. Ackerson: That is all. [122]

Mr. Wright: I have no further questions of this witness.

The Court: All right. You may step down.

(Witness excused.)

Mr. Wright: I call Robert S. Anis.

ROBERT S. ANIS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name, please?

The Witness: Robert S. Anis.

The Clerk: Will you spell your last name?

The Witness: A-n-i-s.

The Court: Which case is this now?

Mr. Wright: P.S.A., your Honor, 16754.

(Testimony of Robert S. Anis.)

Direct Examination

By Mr. Wright:

Q. Mr. Anis, were you formerly employed by the defendant, Pacific Southwest Airways?

A. Yes, I was.

Q. And when did your employment with them commence? A. On March 9th, 1953. [123]

The Court: 1953?

The Witness: Yes, sir.

Q. (By Mr. Wright): And in what capacity were you employed?

A. As a ticket agent, Operations Agent.

Q. And where were you stationed?

A. San Diego.

Q. At the ticket counter at Lindbergh Field in San Diego? A. That is correct.

Q. And will you describe what your duties were?

A. Primarily my duties were to sell tickets at the counter, manifest flights, handle certain operation procedures; also get the flights out on the ramp from the various gates at Lindbergh Field. And, of course, to take reservations by telephone.

Q. And for approximately how long were you engaged in these duties for Southwest?

A. I was—I terminated at P.S.A. on April 13th of this year.

Q. You mentioned that you also engaged in handling reservation calls that came in to the counter, is that it? A. Yes, sir.

(Testimony of Robert S. Anis.)

Q. Where would those calls come from?

A. Various ticket agencies, airline agencies, located [124] within the San Diego area.

Q. Did Pacific Southwest have its own ticket office in any other location in that area other than Lindbergh Field?

A. No, sir, it did not.

Q. Are you able to recall what agencies you got calls from regarding reservations or some of them?

A. In general I can name some of them.

Q. Will you name some?

A. I received telephone calls from Skycoach, North American, now defunct Air America, certain agencies known as Airline Reservations, which is the total name I know it by, various travel services in and around San Diego.

Q. Do you know of your own knowledge whether or not these various agencies which we have named were issued Pacific Southwest ticket stock?

A. To the best of my personal knowledge they were.

The Court: Excuse me. Will you read the last question and answer, please?

(The record was read.)

The Court: What do you mean by ticket stock?

Mr. Wright: Tickets of Pacific Southwest Airways.

The Court: You mean were the agents given tickets to pass out over the counter?

(Testimony of Robert S. Anis.)

Mr. Wright: To sell, that's right, your [125] Honor.

The Court: Is that your understanding?

The Witness: That is my understanding of the question.

The Court: All right. Would you keep your voice up a little bit? I didn't get that "ticket stock."

Mr. Wright: All right.

Q. (By Mr. Wright): Then these calls that were received at the counter at the reservations office at Lindbergh Field were for the purpose of confirming space on a Pacific Southwest flight?

A. I would like to clarify your question just a little. You say "confirming space." They were requesting space and at times confirming space that had been previously requested.

The Court: Well, I take it that when somebody wanted a ticket they would go into one of these ticket offices and ask for a ticket and the ticket agent would call you up to see whether or not they could get space upon a certain flight requested?

The Witness: That is correct, sir.

The Court: And if you said yes, then they filled in the ticket and sold the ticket and collected the money?

The Witness: Yes, sir.

The Court: And then the ticket agent remitted the money to you at some time later?

The Witness: The direct accounting between the agency and the airline I have nothing to do [126] with.

(Testimony of Robert S. Anis.)

The Court: All right. But they did sell the ticket and deliver it?

The Witness: Yes, sir.

The Court: And then they had to account to the company for the money which they collected?

The Witness: In whatever manner they collected it.

The Court: Will you keep your voice up? The reporter may have trouble getting it.

Q. (By Mr. Wright): In those cases where space was requested and confirmed did you or other personnel at the Pacific Southwest counter at Lindbergh Field have to make out any tickets for those confirmed reservations?

A. That could work both ways.

Q. I will limit that to these calls that came from these agencies, not from just a member of the public.

A. The limitation wouldn't help my effective answer.

Q. Go ahead and explain it.

A. Primarily because it is quite possible, but rarely so, that an agent may be short of stock, utilizing therefor an exchange order. He might also have a late passenger call and have directed him to come directly to the ticket counter to get the ticket there. Ordinarily and under ordinary routine circumstances the passenger would have the ticket from the agency.

Q. Do you know of your own knowledge

(Testimony of Robert S. Anis.)

whether these [127] agencies also sell tickets on other airlines or also sold tickets on other airlines than Pacific Southwest?

A. Yes, sir, I do know.

Q. Do you know what other tickets than Pacific Southwest they sold?

A. I have been present in an agency office when other tickets were sold on California Center Airlines and various other carriers, too.

Q. Now, when these calls came in from various agencies confirming space, was there any record wherein you confirmed space? Was any record kept in Pacific Southwest's files on the confirmation of that space?

A. Yes, sir. On the reservations cards within the reservation section of our office—of their office there—we had a card for each flight on which was portrayed the picture of the flight from the standpoint of the number of passengers, destination and agency calling in. A small column was utilized for that purpose and we used various codings, initials of agencies and other airlines to designate the ticket seller.

Q. Do you recall what those codings were and what they represented, or some of them?

A. Some of them were the same—identical to the testimony given earlier by Mr. Chambers: SKC for Skycoach, A.A. for Air America, when they were in operation, N.A.A. for [128] North American Airlines, et cetera.

Q. And you say that code would be entered on

(Testimony of Robert S. Anis.)

the reservation card when space was confirmed to that agent? A. Yes, sir.

Q. Did these various agents provide transportation to the airport or to Linbergh Field for the passengers to whom they sold tickets?

A. To the best of my knowledge they did not.

Q. Then passengers just went to the airport in any manner that they saw fit?

A. Yes, sir. I believe in San Diego it is pretty standard.

Q. With their baggage, if they had any?

A. Yes, sir.

Q. And will you describe the check-in procedure at the ticket counter as the passengers checked in for the flight?

A. Yes. A passenger would step to the ticket counter and there is a previously prepared manifest form at the ticket counter and the head of the form designates the flight number and general information of importance to the operations personnel within the airline. The passenger would present his ticket and at the same time we would ask the name of the passenger, check the name and ticket against the reservations card, and if he was a confirmed passenger on that card, enter him on the manifest, check in his baggage, [129] tell him what time and at what gate we were departing, and that would be the complete check-in procedure.

Q. When the passenger checked in at the counter with his baggage, did his baggage contain any kind

(Testimony of Robert S. Anis.)

of a baggage check on it at all before P.S.A. used their baggage checks to identify the baggage?

A. Usually, no. From a particular agency there was occasionally a personal identification which was not designated necessarily as a baggage tag, but it was a personal identification tag which sometimes had been placed on the baggage prior to its arrival at the ticket counter.

Q. Was there, during the check-in procedure any segregation or separation of baggage according to destination?

The Court: Well, now, before you answer that let's find what you mean by "destination." They come in to San Diego, come to Los Angeles. Do you mean Oakland, San Francisco, points East?

Mr. Wright: By "destination" I mean the points to be served by the flight, whether it be Long Beach, Burbank, San Francisco or Oakland.

The Court: Well, if they presented a ticket from San Diego to Los Angeles, why would there be? Well, they might present a ticket from San Diego to Oakland. Assuming that they did present a ticket showing different places in California, was there any attempt to segregate the baggage? [130]

The Witness: I would like to answer that in two parts, if I may. A passenger came to the counter, going from San Diego to Oakland, P.S.A. As any other carrier designated its ticket and baggage checks by color or some form that makes it easy for a fast loading and unloading, consequently it was a very simple task to tag the baggage for its

(Testimony of Robert S. Anis.)

proper destination with a green tag or a yellow tag for Oakland or San Francisco. The segregation as such would be made out at the airplane by the porters and captains handling the baggage, if there was a necessary segregation.

The Court: Let me ask this witness a question. Assuming that a passenger went into a ticket agent in order to buy transportation to New York and the ticket agent said, "Well, now, I can only get you transportation from Los Angeles to New York, but I can get you transportation from here to Los Angeles." So he sells him a ticket, Los Angeles to New York; he also sells him a ticket Lindbergh Field to Los Angeles. And a man comes down and presents the ticket, Lindbergh Field to Los Angeles. Do you have any way of knowing that he is going on to New York from Los Angeles?

The Witness: Yes, sir, under certain conditions I do.

The Court: Would it be one ticket or two tickets?

The Witness: It would be two tickets joined together with a common staple. The ticket, the inter-line form ticket, [131] a book form of ticket sometimes used by some agencies, would have a P.S.A. ticket stapled on the inside of it, and that ticket of course would be removed in flight by the person who picks up the tickets.

The Court: Well, then——

The Witness: I would tag the baggage only to the destination of the P.S.A. flight.

(Testimony of Robert S. Anis.)

The Court: Well, now, would the P.S.A. ticket be attached to the entire ticket? Would it be just one ticket or one book?

The Witness: It would be the one book with a P.S.A. ticket, a separate ticket attached by staple to the inside of the cover of the other ticket.

The Court: All right. When they presented the ticket to you—would they have to present the ticket to you?

The Witness: They would present the whole thing usually.

The Court: They would present the whole thing?

The Witness: Yes, sir.

The Court: And then you would know that the passenger's destination was actually New York?

The Witness: Yes, sir.

Q. (By Mr. Wright): Regardless of whether or not a passenger presented a ticket which was either North America's or Skycoach ticket to New York, coupled with the P.S.A. ticket [132] between San Diego and Los Angeles or Burbank, you checked them in for the flight just the same as any other passenger as long as he had the P.S.A. ticket?

A. Yes, sir, and as long as we had a confirmed reservation.

Q. And the P.S.A. ticket would show the fare on its face, would it not?

A. Yes, all tickets show fare on the face.

The Court: Just a minute. You mean the P.S.A.

(Testimony of Robert S. Anis.)

ticket would show the fare from San Diego to Los Angeles?

The Witness: Yes, sir, only for the P.S.A. portion.

The Court: Only for that portion of it?

The Witness: (Nods head affirmatively.)

Q. (By Mr. Wright): And the other ticket, if the passenger had another ticket, to New York or Chicago would also show the fare from San Diego, that carrier's fare, from San Diego to New York or Chicago, would it not?

A. It would show a fare, which was the fare paid by the passenger at the agency in San Diego.

Q. When you say the fare paid by the passenger, you mean the total fare paid by the passenger for the two tickets would be the amount entered in the transcontinental ticket?

A. That would seem to be the apparent total, but I would have to refresh my knowledge on that particular item.

Q. Did you work for this airline ticket agency at one time? [133]

A. No, sir.

Q. Now, did these ticket agents sometimes issue their own exchange orders rather than Southwest tickets?

A. I would like to clarify that. I have seen exchange orders and handled many exchange orders. Would you repeat the question, please?

(Question read.)

(Testimony of Robert S. Anis.)

Q. (By Mr. Wright): I will withdraw that question and ask you: What is an exchange order?

A. To the best of my knowledge an exchange order is a form utilized between the airline and the selling agency to facilitate the handling of a passenger when ticket stock is short; also to achieve an immediate payment of commission at the time of sale of the ticket, and at that time the passenger would pay what amounts to a down payment to the agent selling the ticket. The agent would enter the amount he had received in one column of the exchange order, the balance due in another column, the ticketing agent at the field would then issue a ticket and collect the balance due on the exchange order at the San Diego counter or whatever counter was involved.

Q. Now, I show you Plaintiff's Exhibit No. 2 and with particular reference to the lower portion thereof there is an exchange order. Were those exchange orders in use at all at the Lindbergh Field ticket office of Pacific Southwest [134] Airways?

A. Yes, sir, an exchange order of this type was in use.

Q. And were they used in the manner in which you have just testified or for some other purpose?

A. No, sir, they were used in the manner which I have just testified to. I would like to amplify that, incidentally, if I may.

Q. You may.

A. At a later date a slightly different form carrying slightly less information on the face of the ex-

(Testimony of Robert S. Anis.)

change order was utilized, and other than that it was the same.

Q. Can you point out what the difference is, if you can recall?

A. It is a little difficult now offhand to recall, but there was some slight change in the makeup of the face of the exchange order itself.

The Court: Is there such a thing as an exchange order between airplane lines? Can one airplane line give an order to another for a ticket?

The Witness: It is my understanding—is the question addressed to me?

The Court: Yes.

The Witness: It is my understanding that on the basis of an interline agreement that they can do that. What the [135] exchange order usage was—what use was made of exchange orders in large accounting procedures between the airlines with which I was employed and others, I have no knowledge.

The Court: Well, when you talk about exchange orders you are really referring to an order given by the agent upon the line for the sale of the ticket?

The Witness: That's correct.

The Court: The sale has been made, the agency has collected part of it, the person goes in and presents his order and picks up the ticket and pays the balance?

The Witness: Yes, sir.

The Court: And that is what you refer to as an exchange order?

The Witness: Yes, sir. There are specific excep-

(Testimony of Robert S. Anis.)

tions to it, such as the possibility of an agent being out of stock and he will issue an exchange order in lieu of a ticket and collect the full amount.

The Court: I see.

The Witness: And return it on some later billing by a previous arrangement with the company.

Q. (By Mr. Wright): Now, did there ever come in your experience working at the ticket counter at Lindbergh Field for Pacific Southwest a time when a flight was oversold?

A. You mean at San Diego?

Q. That's right. [136]

A. Yes, sir, we have had occasion to have flights oversold, overbooked.

Q. Overbooked?

A. That would be the designation.

Q. And what do you mean by overbooked or oversold?

A. Through possibly a lack of liaison between persons on duty on a particular shift it was possible to overbook, book more passengers than the plane could legally carry, that would constitute overbooking.

Q. And that did occur during the time you were working at the ticket counter?

A. Yes, sir, there have been occasions of that nature.

Q. Were you alone at the counter or did you have other agents with you?

A. There were usually other agents working

(Testimony of Robert S. Anis.)

the same shift and we rotated the counter as seemed feasible to handle the people coming in.

Q. And these instances where you were over-booked, how did you handle the situation?

A. If everybody showed up we protected space on other carriers. I don't know if that makes complete sense, but we would go on a first-come, first-served basis for the most part. I would say, first-come, first-served based on the reservations that were there, and then call other carriers who had flights as close to our flight time as possible, and [137] if they had space we would protect the passenger on that carrier. We would refund the passenger's ticket if we could not carry him and send him over to the other counter down in the Terminal.

Q. Was there any criteria? Or how did you determine who would be refunded and who would be checked in and given space on your ship?

A. In general naturally P.S.A. was in business like any other business to make a dollar. In general we tried to protect all of our through passengers, and by through passengers, I mean passengers from San Diego to San Francisco and Oakland. However, a fair sized percentage of passengers on certain flights were passengers going only on P.S.A. as far as Burbank. We would attempt to protect those who were meeting other flights out of Burbank if we possibly could. If protecting space out of San Diego could be obtained but could not protect the passenger further

(Testimony of Robert S. Anis.)

on, we would try to do some switching even if it involved discussing it with all passengers involved at the counter.

Q. Now, you referred to passengers for connecting flights. What kind of passengers would they be?

A. As I mentioned in my earlier testimony, agency passengers would come in with a ticket form and another P.S.A. ticket form stapled to the inside of it. It was obvious that they were going on to some other destination other than [138] the Los Angeles area. We did our best to protect those people, to get them up to Burbank in time to catch the other flights.

Q. On your flight? A. Yes, sir.

Q. Had you received any instructions from any superior in Pacific Southwest regarding the policy on who should be refunded and who should be kept on Pacific Southwest flights in the event of an overbooking?

A. Well, yes and no, in that when I joined the company I was informed it was general custom. Later I was advised by the local station manager that in spite of the fact that—You see, there was—and I can only speak of the time during which I was employed by the organization—a statement on the face of the ticket which is common to most tickets and most carriers to the effect that the airline reserves a half hour, or it might be some other period of time, right of reservation, the right to resell that space if a passenger does not show

(Testimony of Robert S. Anis.)

up in time to check in. The exercising of that right was left to the agent's discretion. For the most part it was general practice, as I was advised shortly after I was employed, to protect the passengers connecting out of the Burbank area.

Q. Now, when you use the term "protect" there, do you mean keep them on a Pacific Southwest flight or protect them [139] on some other carrier?

A. No, keep them on Pacific Southwest Airlines flight.

Q. When you testified regarding connecting flights at Burbank, just what did you mean? Do you mean connecting flights that were going to continue only within the state of California or flights going outside the state of California?

A. I would like to preface my answer to that by saying that "connecting" is perhaps a misnomer in that there was no specific connection as such; but passengers held tickets on other flights out of Burbank eastbound to, oh, anywhere from Dallas to Kansas City, Chicago to New York.

Q. And both of those tickets were presented at the time that they checked into the flight?

A. In many, many instances, yes.

Q. Now, do you have any knowledge—I don't know whether I asked you this or not — as to whether or not these passengers holding these two tickets paid the agents from whom they bought them the total of the fare which appears on the face on the Pacific Southwest Airways tickets plus

(Testimony of Robert S. Anis.)

the total of the fare which appeared on the transcontinental ticket? Or do they just pay the total amount that appears on the transcontinental ticket?

A. I cannot answer that because the passenger would present me a ticket. I would have to assume, and it would be only an assumption, that he had paid for it to get possession [140] of it inasmuch as it is the practice to accept full payment before issuing the ticket.

Mr. Wright: I have no further questions.

Cross-Examination

By Mr. Gardiner:

Q. Mr. Anis, you testified that while you were employed by Pacific Southwest at the Lindbergh Terminal that you received many calls for reservations or to confirm previous reservations from travel agencies. Did you also receive calls from individuals who would call up and ask for a reservation? A. Oh, yes, sir, yes, sir.

Q. And would you receive counter calls, persons who came into the airport requesting reservations? A. Oh, yes.

Q. Which category would you say constituted the larger number of sales of tickets, the individual persons or travel agencies?

A. I would make a very rough estimate from this position of a 65-35 breakdown, with the 35 being the agency side of the picture.

(Testimony of Robert S. Anis.)

Q. The majority, then, were from individuals. When individuals would come in did they ever present what is known as an open space ticket on Western Airlines or United [141] Airlines showing passage from San Diego to either Burbank or Long Beach or San Francisco?

A. Would you repeat that, please, sir?

Q. Yes. I will rephrase it slightly. When you were on counter duty did you ever experience an individual coming in and requesting passage to another city in California which you served and ask if he could pay for such space with an open space reservation or ticket of United Airlines or Western Airlines?

A. I have had a rare occasion of that sort, yes.

Q. And what would your reply be to such a request?

A. He would have to refund his ticket he had on Western Airlines at the Western Airlines ticket counter and purchase a ticket from Pacific Southwest.

Q. In other words, Pacific Southwest would not accept a ticket of Western Airlines or United Airlines for transportation on P.S.A.?

A. No, sir. The direct answer is no.

Q. Would Pacific Southwest accept the tickets of any other air carrier for travel in California?

Mr. Wright: If he knows.

Q. (By Mr. Gardiner): If you know.

A. I would have to answer that to the best of my knowledge on a ticket-selling basis, no, sir.

(Testimony of Robert S. Anis.)

Q. The passenger's name does not appear on a Pacific [142] Southwest Airline ticket, does it?

A. No, sir, it does not.

Q. And the ticket stock to which reference has been made is a different type of ticket stock than that customarily used by either the major trunk line carriers or the agencies?

A. That is true. P.S.A. uses a coupon-type ticket, as compared to the usual standard interline form used by trunk line carriers.

Q. And that ticket—I will introduce copies of those later, your Honor—that ticket has printed on it the destination and the price of the fare?

A. Yes, sir, and the tax.

Q. When passengers who had procured tickets from a ticket agency presented to you an interline form ticket and simultaneously presented a P.S.A. ticket, did the interline form ticket possess any particular significance to you as a P.S.A. employee?

A. Yes, sir, it did, in a minor way, inasmuch as it was necessary to present the interline ticket, inasmuch as the P.S.A. ticket was stapled to the inside of the front cover. Now, on our manifest form, on the very left-hand side of the manifest as you look at it, you would designate the final agent handling the ticket and you could designate it very properly by observing the total form handed you, so there could be no mistake. [143]

Q. It facilitated identification of the agent who sold the P.S.A. ticket?

A. Yes, sir.

(Testimony of Robert S. Anis.)

Q. But your first knowledge that such a passenger possessing an interline form ticket was going to go on an interstate journey occurred when he showed it at the P.S.A. counter; is that correct?

A. In many instances, and I would say the majority of instances, yes. There would be an occasional late call from an agency asking if we could possibly get space because they had to meet such and such a flight and they had somebody at their counter and so on, things of that nature.

Q. That was the rare exception, was it not?

A. As compared to the other procedures, yes.

Q. When a person having in his possession an interline ticket which indicated that he was apparently going to go to Chicago, Kansas City or New York, would you, in placing a P.S.A. baggage check or any baggage check on it, check it to such final destination?

A. No, to the final P.S.A. destination only.

Q. And no further? A. And no further.

Q. Mr. Anis, counsel for the Civil Aeronautics Board exhibited to you Plaintiff's Exhibit 2 in this action. Do you still have that before you? [144]

A. No, sir, I do not.

(The Clerk handed the document referred to to the witness.)

The Witness: Thank you.

Mr. Gardiner: Thank you.

Q. (By Mr. Gardiner): I direct your atten-

(Testimony of Robert S. Anis.)

tion to the exchange order portion of that Exhibit 2 and particularly to the rectangular block or blocks on the left-hand side. Would you explain the meaning that the initials in those blocks possess to you as a——

A. You are speaking of SKC over Agent's Validation?

Q. Yes. A. Skycoach.

Q. And Skycoach is what? Is Skycoach an agency, if you know?

A. It is to my knowledge a ticket agency. It is also more than a ticket agency to my knowledge.

Q. And would you maintain on this manifest sheet the initials of the company whose initials appear in that Agent's Validation box?

A. Would you ask me that again, please?

Q. You mentioned a few moments ago that on your manifest sheet you placed a list—I think you called it the final agent or the agent who would be given credit for that——

A. That is the agency by initials, such as Skycoach, [145] not an individual.

Q. Yes. Is it your understanding that the commission for the sale of the Pacific Southwest tickets represented by this exchange order would be paid to the Skycoach agency?

A. On the basis of the presentation in this exhibit, yes, sir. I might add, if I may, that I have no knowledge of the meaning of the figures in the upper right-hand corner of that exhibit, on the exchange order.

(Testimony of Robert S. Anis.)

Q. You have reference to the——

A. 5951-529, and the figures at an angle beneath it. I have no knowledge of the meaning of those figures.

Q. You mentioned a minute ago that upon occasion a flight would be overbooked. How frequently would that occur in your experience?

A. It varied with the traffic itself, of course. There was a period of time when it was an almost nightly occurrence. That was for a short period of time, and then of course on heavy week ends it would come up again.

Q. Upon such occasions when you called other carriers to protect some of the overbooked passengers, you were doing that as a courtesy to those passengers for whom you did not have space; correct?

A. That is correct, yes, sir.

Q. Do you recall which of the other carriers those overbooked passengers ultimately procured passage on to another point in the state? [146]

A. Within the state? Yes, sir. For a period of time when our schedule was stable, California Central Airlines had a flight leaving shortly after our schedule and later they changed. It was leaving shortly before our late schedule and we invariably would try of course to protect our particular flight because it was the closest to the P.S.A. schedule and gave us a chance to talk to the passengers at a time when we could still help them.

Mr. Gardiner: No further questions.

(Testimony of Tillie Gamble.)

Mr. Wright: Her testimony is going to be general and very short, your Honor. It will probably affect both.

The Court: All right.

Mr. Keatinge: If your Honor please, I wonder if at this time I could note my appearance for the witness Tillie Gamble. Richard H. Keatinge, Keatinge, Arnold & Zack.

The Court: Your appearance may be [151] noted.

Direct Examination

By Mr. Wright:

Q. Miss Gamble, are you employed at Lockheed Air Terminal at Burbank? A. That's right.

Q. By whom are you employed?

A. Currey Air Transport.

Q. That is a large irregular carrier?

A. That's right.

Q. Are you also employed by Great Lakes?

A. I am

Q. And that is a large irregular carrier?

A. Yes, sir.

Q. Will you tell us just what your duties are at Lockheed Air Terminal in connection with these two carriers, briefly?

A. I am assistant to the chief pilot, I do the crew scheduling, flight scheduling, keep all the flight records.

The Court: Of what?

(Testimony of Tillie Gamble.)

The Witness: Of both Currey Air Transport and Great Lakes Airlines.

The Court: Both of them?

The Witness: Yes, sir.

Q. (By Mr. Wright): During 1953 both Currey Air Transport and Great Lakes Airlines were operating DC-4 aircraft, were [152] they not?

A. Yes, sir.

Q. Will you state what points they were serving in the United States, to be best of your recollection?

A. Various points. They served Oakland; Kansas City, Missouri; Chicago, Illinois; Philadelphia, Pennsylvania; New York; Newark; and various other points, dependent upon where they were required to operate.

Q. Do you have any connection at all with the dispatching of flights?

A. Only with the alerting of crews.

Q. Do you know whether or not Currey and Great Lakes on their eastbound flights—withdraw that.

The eastbound flights of both Currey and Great Lakes originate at Burbank, do they not, as far as the DC-4 aircraft are concerned?

A. Not always.

Q. Sometimes in Oakland? A. Yes, sir.

Q. Do you know from your own personal knowledge whether or not those carriers also transport persons who come up from San Diego to Burbank?

(Testimony of Tillie Gamble.)

The Court: I think you had better elucidate. They may come up by automobile, they may come up by train. What do you mean? They may come up by boat, or they may even walk. What [153] do you mean?

Mr. Wright: That was preliminary, your Honor. I was going to come to that.

The Court: It is immaterial. Supposing they walk up from San Diego, what difference would it make as far as this case is concerned?

Mr. Wright: I will withdraw that.

Q. (By Mr. Wright): Miss Gamble, do you know of your own knowledge whether Currey and Great Lakes on their eastbound flights originating in Burbank carry persons who are transported to Burbank from San Diego by California Central and Pacific Southwest?

A. Well, I can't answer that question. The only way I can answer that question is to say that passengers, I know, are supplied us from different agents all over the country. How they arrive here I can't tell you.

Q. And do you know whether or not westbound passengers arriving in Burbank on the flights of Currey and Great Lakes are transferred to California Central or Pacific Southwest?

A. Passengers arriving are at times transported by both of those carriers, also by United Airlines, by Western Airlines.

Q. It is practically a regular occurrence with each flight? A. No. [154]

(Testimony of Tillie Gamble.)

The Court: May I ask this witness a question?

Mr. Wright: Certainly, your Honor.

The Court: Assuming that a passenger comes in from the East, New York, Philadelphia, or Chicago, on a Currey plane, and they are going to San Diego, do you have anything to do with arranging transportation to San Diego, what plane they go on and when they go?

The Witness: No, sir.

Q. (By Mr. Wright): Miss Gamble, are you familiar with the manifest used by Currey Air Transport? A. Yes, sir.

Q. I show you Plaintiff's Exhibit No. 15 in 16,754-HW, and ask you whether or not that is a photostat of a manifest of Currey Air Transport.

A. Yes, sir, it is.

Q. Referring to page 3 of this Exhibit 15, Miss Gamble, at the bottom of the page there is an Exchange Order; are you familiar with that particular document?

A. No, I am not. I have nothing to do with those at all.

Q. You have nothing to do with making out a transfer manifest?

A. No; and I have nothing to do with tickets, either.

Mr. Wright: That is all. No further questions.

The Court: Any cross-examination? [155]

Mr. Gardiner: Do you wish to proceed in the same order as yesterday?

(Testimony of Tillie Gamble.)

The Court: Yes. As this is a general witness, I guess you can proceed first and then Central Airlines second.

Mr. Ackerson: I have no questions.

Cross-Examination

By Mr. Gardiner:

Q. Miss Gamble, does Currey Air Transport currently operate any flights from Burbank to San Diego?

A. No, sir, not very often. Once in a while.

Q. Do they operate any flights from Burbank to Oakland? A. Yes, sir.

Q. Is that a daily flight?

A. Yes, sir. Well—well, I can't say that it is a daily flight, sir. If we have passengers we carry them up.

Q. The two carriers for whom you work obtain passengers in many instances, do they not, from a ticket agency known as Skycoach?

A. Yes, sir.

Q. Do you know if Skycoach furnishes transportation from Burbank to Oakland for incoming passengers from the East?

A. I presume they do—they——

The Court: Let's not presume. If you know, say so; if you don't know, just don't answer the question. Let's not [156] presume.

The Witness: I can't say, sir.

(Testimony of Tillie Gamble.)

Mr. Gardiner: I believe that is all, your Honor.

The Court: May this witness be excused?

Mr. Wright: I have no further questions, your Honor.

The Court: You may be excused.

Mr. Wright: Call Mr. Fritz Hutcheson.

FRITZ HUTCHESON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Fritz Hutcheson.

The Clerk: Spell your name, please.

The Witness: F-r-i-t-z H-u-t-c-h-e-s-o-n.

Direct Examination

By Mr. Wright:

Q. Mr. Hutcheson, are you connected with U. S. Aircoach? A. Not at the present time.

Q. During 1953 were you? A. Yes, sir.

Q. And in what capacity?

A. President. [157]

Q. And will you state what U. S. Aircoach is?

A. U. S. Aircoach is a large irregular air carrier operating under Part 42 of the Civil Aeronautics Board, I believe.

The Court: Will you keep your voice up, please? Counsel has to hear you. Mr. Wright, you also are speaking rather low.

(The answer was read by the reporter.)

(Testimony of Fritz Hutcheson.)

Q. (By Mr. Wright): During 1953 did U. S. Aircoach have space at the Lockheed Air Terminal at Burbank? A. Yes, sir.

Q. A ticket counter and an office?

A. Ticket counter didn't belong to U. S. Aircoach; it belonged to an agency.

Q. But the ticket counter was used by U. S. Aircoach?

A. Used by U. S. Aircoach to dispatch flights, yes, sir.

The Court: Just a minute. The counter was owned by an agency?

The Witness: It was operated by an agency.

The Court: Which agency? What do you mean, ticket agency?

The Witness: Ticket agency.

The Court: Which agency?

The Witness: Metropolitan Travel Service. It was operated by three different agencies during the period of 1953, sir. [158]

The Court: You only used the counter for the purpose of dispatching?

The Witness: Dispatching flights.

Q. (By Mr. Wright): And will you tell us between what points during 1953 U. S. Aircoach was operating?

A. To the best of my knowledge they operated to Dallas, Oakland, Oklahoma City, Kansas City, Chicago, Pittsburgh, Philadelphia, New York City, Miami; and then practically every other city in the

(Testimony of Fritz Hutcheson.)

United States on military Commercial Air Movement, that is C.A.M., CAM movements.

Q. Outside of the CAM movements, U. S. Aircoach operated both east and westbound flights?

A. East and westbound flights, that's right, sir.

Q. Did your flights originate and terminate at Burbank?

A. Not all of them, no, sir.

Q. Referring now to just those flights which were operating transcontinentally, east and west.

A. I believe some of them started in Oakland, and some of them in Burbank.

Q. You were operating what type aircraft?

A. We operated in 1953 DC-4s, C-46s, and DC-3s.

Q. In the Southern California area how many ticket offices were operated by U. S. Aircoach?

A. None, sir.

Q. How did U. S. Aircoach secure its [159] passengers?

A. From various ticket agencies, independent ticket agencies.

Q. And did you put out your ticket stock, issue your ticket stock to these various agencies?

A. Not U. S. Aircoach tickets, no, sir. They operated strictly on exchange orders.

Q. Did U. S. Aircoach on flights originating at Burbank, westbound flights originating at Burbank, secure any passengers from Friedkin Aeronautics, doing business as Pacific Southwest Airlines?

A. If we operated westbound we would have been out over the ocean, sir.

Q. Eastbound.

(Testimony of Fritz Hutcheson.)

A. Would you repeat the question, please?

Q. On eastbound flights originating at Burbank, did U. S. Aircoach receive passengers from Friedkin Aeronautics or Pacific Southwest Airlines?

Mr. Ackerson: I object to that question on the ground it is calling for a conclusion that is almost legal in form. I don't mind him asking the witness how he got his passengers, if any. But he is asking a question, did U. S. Aircoach get passengers from Freidkin?

I assume that he is going to ask the same question from my client. He stated he got it from the ticket office.

The Court: Friedkin hasn't objected. [160]

Mr. Gardiner: We will adopt those objections, your Honor. I am anxious to expedite this hearing, and I don't want to make too many technical objections. But I agree with that objection.

The Court: Perhaps you had better reframe your question.

Mr. Wright: I will withdraw the question.

The Witness: I couldn't answer it anyway.

Q. (By Mr. Wright): Mr. Hutcheson, I show you Plaintiff's Exhibit No. 21, which consists of two pages, and ask you whether or not the first page thereof is a U. S. Aircoach manifest.

A. That is a U. S. Aircoach manifest, yes, sir.

Q. And with reference to the handwritten portion in the body, was that made by one of your employees?

(Testimony of Fritz Hutcheson.)

A. That wasn't made by a U. S. Aircoach employee, no, sir.

Q. Do you know who it would have been made by?

A. It was made by one of the agencies. It looks like—I don't recall exactly who W.C.W. is, but it would be one of the agency employees.

Q. Wouldn't that be W. C. Wingate?

A. That would be Wingate, yes.

Q. Who is he employed by?

A. He was employed by, I believe, American Air Bus.

The Court: American what?

The Witness: Air Bus. That was an agency. I believe they [161] changed their name to—I don't recall right now, but I know they changed their name. The name originally was American Air Bus, and American Airlines objected, and they changed their name to Continental Air Bus, or something like that.

Q. (By Mr. Wright): Can you by reading this handwritten material on the first page of Exhibit 21 tell us what it means?

A. It says, "Off 60 V Flight 108 W. Out PSA Flight No. 90 at 11:30 A.M. BUR/SAN WCW."

Q. Does 60 V stand for partial NC designation of aircraft?

The Court: I am sorry, but I am going to ask both counsel and the witness to speak up. I am sitting right here by you, and I am satisfied that counsel cannot hear you, and even the reporter can't

(Testimony of Fritz Hutcheson.)

be hearing you. I think possibly you ought to speak a little louder.

Now, let's start all over again.

The Witness: That is the NC number of one of our C46 aircraft.

Q. (By Mr. Wright): Does the FLT 108W represent a flight number?

A. That apparently represents a flight number of U. S. Aircoach's incoming flight from the East.

Q. With reference to the next notation on the front page of Exhibit 21, which appears to refer to PSA Flight 90, can you tell us what that [162] means?

A. Sir, I didn't write it. I assume it means what it says. It says, Out PSA Flight 90.

Q. In layman's language what would that mean?

A. Just exactly what it says, Out PSA Flight 90.

Q. Do you mean that those passengers were put on board a PSA flight?

A. I couldn't say that they were, but that is what the manifest says.

The Court: PSA, what is that?

The Witness: Pacific Southwest.

Q. (By Mr. Wright): Referring to page 2 of Exhibit 21, which contains an exchange order, are you familiar with that particular type of exchange order, or were you during the operation of U. S. Aircoach? A. I don't believe I was, sir.

Q. You didn't handle any of the paper work?

A. I didn't handle any of the paper work at all. That wasn't my job.

(Testimony of Fritz Hutcheson.)

Q. Have you ever seen this type of exchange order?

A. I have seen Pacific Southwest exchange orders. I have seen every airline's exchange order.

Q. Well, that exchange order, does it not represent an order for the transportation of four passengers from Burbank to San Diego?

A. Would you rephrase that question, [163] please?

Q. Does the exchange order, which is on page 2 of Plaintiff's Exhibit No. 21—I will change that. Was that issued to provide transportation for four passengers between Burbank and San Diego?

A. You are asking me a question that I can't answer. I mean, I didn't handle the paper work.

Q. You don't know whether any of the passengers that came on that particular flight were transported further on Pacific Southwest?

A. I wouldn't have the slightest idea whether they were or not. I never handled such things.

Q. You are the president——

A. Of U. S. Aircoach, that's right.

Q. Do you know whether or not incoming passengers from westbound flights operated by U. S. Aircoach were transferred to Pacific Southwest Airways?

A. It is my understanding they were transferred on the first airline that there was space available, whether it was Pacific Southwest or California Central or Western Airlines, United Airlines, whatever they could find space on, the first flight avail-

(Testimony of Fritz Hutcheson.)

able, why, they put them on. That was the general procedure that I know about.

Q. In that case the onward transportation was paid by U. S. Aircoach, was it not?

Mr. Gardiner: I object to that question as leading and—— [164]

The Court: You are assuming something, because supposing the destination was Los Angeles, why would U. S. Aircoach pay onward transportation to Seattle or to Portland or to Oakland or to San Diego?

Now, may I ask this witness a question?

Mr. Wright: You may, your Honor.

The Court: Tickets on your line usually sold, if it came to Los Angeles, destination Los Angeles?

The Witness: Yes, Burbank.

The Court: Did you sell any tickets destination San Diego?

The Witness: The agency in the East sold San Diego and Oakland.

The Court: When a passenger came with a ticket sold by an agent that called for San Diego, and they disembarked here in Los Angeles, what did you do with them?

The Witness: We terminated the flight in Burbank. The agency handling the passengers were supposed to off-space them on whatever carrier they could get space to get them the fastest transportation. They were put on bus, they have been put on trains, some of them go by private automobile.

The Court: Do I understand this—is this a fair

(Testimony of Fritz Hutcheson.)

statement—that when you brought in passengers from the East that were to go to San Diego, that you turned them over to an agency? [165]

The Witness: No; the agency handled our flights, in other words, U. S. Aircoach didn't handle the flights directly, the agency employees handled our flights as they came in and took care of off-spacing the passengers, just like any ticket counter would. It is handled by an agency.

The Court: All right. Supposing an agency had sold a ticket to San Diego, and the passenger came in here to Burbank and disembarked, what did you do with that passenger?

The Witness: They would make arrangements.

The Court: The agency?

The Witness: Yes, to put those passengers on the first available flight that they could get to San Diego, the fastest form of transportation. If they were going to Camp Pendleton and were destined for San Diego, the boys would sometimes request that they take the Santa Fe bus, because they get there faster, rather than go to San Diego and back. So we would give them bus fare.

The Court: Did you have anything to do with the arranging of this transportation?

The Witness: I didn't have anything to do with the arranging of it.

The Court: Did your company have anything to do with it?

The Witness: Only by instructions to the agencies. As far as I know I don't think the company

(Testimony of Fritz Hutcheson.)

itself. U. S. Aircoach operated a little differently than most of them. [166] U. S. Aircoach, all their handling of their flights, and so forth, was generally done by an agency, it wasn't done by the company itself, under contract. The agency got an override on all passengers, they got a five per cent override, that is why they handled all their flights for them under contract, and U. S. Aircoach themselves usually didn't handle them themselves. We separated the two.

The Court: When the passenger disembarked here at Burbank, did you feel your responsibility was over?

The Witness: No. It was up to the agency under this contract to take and see that those passengers got the fastest form of transportation and the first available form of transportation to their destination with the least amount of delay. Whichever space was available that is the one that they had instructions to put them on. In other words, it would make no difference who it was, whoever they could get the fastest form of transportation from.

The Court: Suppose a passenger disembarked at Burbank, going to San Diego, and they were put upon a Southwest plane, who paid for the plane passage?

The Witness: That is the one thing I can't—I don't recall, whether the company reimbursed them for it, or whether the agency paid it and then it was reimbursed by the company. Eventually the oper-

(Testimony of Fritz Hutcheson.)

ating carrier would reimburse. But whether they actually paid—who they paid, whether they paid the [167] agency for it, I don't remember. I believe it was different at times, because we changed operations two or three times during the year. We went from one general agent to another. In other words, for a while we were operating—Safeway Air Coach was handling all our flights, and then American Air Bus, and then they changed the name to another one. I just don't recall exactly who paid for the passengers, whether we paid the different carriers direct or whether it was paid for by the agency, and then they billed the carrier for it. That I couldn't answer. I couldn't be exact on it. I wasn't familiar enough with the accounting procedures on that.

Mr. Wright: May this be marked for identification as Plaintiff's Exhibit No.——

The Court: It will be 23.

The Clerk: Plaintiff's Exhibit 23 for identification. That is in '754?

Mr. Wright: Yes.

(The document referred to was marked Plaintiff's Exhibit 23, for identification in case No. 16754.)

Q. (By Mr. Wright): Mr. Hutcheson, do you know Mr. Joe Stout that works for our office?

A. Yes, sir.

Q. Do you recall an occasion in October of 1953

(Testimony of Fritz Hutcheson.)

when Mr. Stout came to your office at Lockheed Air Terminal? [168]

A. Mr. Stout came to our office quite often, sir. I don't remember any specific instance.

Q. You have no recollection whatsoever of Mr. Stout coming to your office in October of 1953 and requesting permission to examine some of your records, manifests?

A. Mr. Stout was instructed any time he came to our office that our office was wide open, he could go into our records at any time, go through our records at his leisure and do whatever he wanted with them. I don't remember any specific instance.

Q. Mr. Hutcheson, I show you Plaintiff's Exhibit No. 23 for identification.

The Court: Have you shown that to opposing counsel?

Mr. Wright: No. I beg your pardon.

The Court: Don't try to use it until counsel has a chance to look at it.

Q. (By Mr. Wright): I show you Plaintiff's Exhibit No. 23 for identification, Mr. Hutcheson. It purports to be a photostatic copy of a document, and I ask you whether or not you are familiar with that particular form.

A. I am not familiar with it, no, sir. It is the first time I have seen one of these forms.

Q. The name of your company is mentioned, is it not?

A. It has been written in at the top, U. S. Air-coach.

(Testimony of Fritz Hutcheson.)

Mr. Wright: I request that this document be marked for [168-A] identification as Plaintiff's Exhibit No. 24 for identification.

The Court: 24 for identification.

Mr. Wright: Consisting of two pages.

The Clerk: 24 for identification.

(The document referred to was marked Plaintiff's Exhibit 24, for identification, in case No. 16754-HW.)

Q. (By Mr. Wright): Now, Mr. Hutcheson, I show you Plaintiff's Exhibit marked No. 24 for identification, consisting of two sheets, purporting to be photostatic copies of various documents, and I ask you to examine it. Have you examined both pages of the exhibit, Mr. Hutcheson?

A. Yes, sir.

Q. Are you able to tell us whether or not those are photostatic copies of manifests and tickets of U. S. Aircoach?

A. They appear to be. Manifests and ticket stocks, both, original flight coupons, it looks like.

Q. Now, with reference to the two tickets that appear on the first page, can you tell from the validation stamp where that ticket was sold, or those tickets?

A. Not from the validation stamp. I can tell from the issued exchange order where they were sold, where it says, "Issued in exchange for." It apparently was sold by [169] Skycoach in Philadelphia on their original exchange order.

(Testimony of Fritz Hutcheson.)

Q. And your ticket calls for transportation from Philadelphia to San Diego, does it not?

A. That's right, sir.

Q. And the ticket——

Mr. Gardiner: Do we have the answer to that last question?

The Court: Read the question and the answer.

(The question and answer were read by the reporter.)

Q. (By Mr. Wright): And you were referring in your answer to the ticket marked B-19524, were you not, Mr. Hutcheson?

A. B-19524 and B-19523.

Q. Those particular coupons are flight coupons, are they not, that are picked up by the carrier or ticket agent at the time the passenger boards the——

A. Not these two particular ones, no.

Q. Which are these?

A. These are the ones that are made out in our accounting office after the flight is terminated and we make out the U. S. Air flight coupons. The ones that were picked up would be the Skycoach of Philadelphia exchange orders.

Q. In other words, the passengers who held those two coupons were flown from Philadelphia to Burbank by U. S. Aircoach on an exchange order of Skycoach? [170]

Mr. Gardiner: I object to that question as assuming something not in evidence. The witness has testified that these were made up after the flight.

(Testimony of Fritz Hutcheson.)

Counsel's question referred to these coupons being held by the passenger.

The Court: Sustained.

I don't think, when a document has been marked for identification, that you have any right to go into the document except for the purpose of laying the foundation for it to be admitted into evidence. And then when you get it into evidence you can examine as to the document. But until you get it in evidence I don't think you can examine on the document.

Q. (By Mr. Wright): Mr. Hutcheson, referring again to Mr. Stout, do you have any recollection at all of last October him making photostatic copies of some of your records?

A. As I previously stated, Mr. Stout was free to come into our office any time and make photostatic copies of all of our records. I don't recall any particular time, because they were in our office quite often.

Q. Have you seen him make copies in your office?

A. I didn't see him make the copies, but they asked me if they could take records with them and make copies, and I told them, "Do that, and bring the machine in and make them up." But I never saw them actually make copies.

Q. Do the two sheets constituting Plaintiff's Exhibit [171] No. 24, for identification—do they constitute photostatic copies of records of U. S. Aircoach?

A. They look as such, yes.

(Testimony of Fritz Hutcheson.)

Q. You are not sure?

A. They look exactly like U. S. Aircoach records. I don't see how they could be anybody else's.

Mr. Wright: I have no further questions.

Cross-Examination

By Mr. Gardiner:

Q. Mr. Hutcheson, your carrier, U. S. Aircoach, frequently had occasion to carry onward passengers who came into the State from eastern cities upon your carrier to Oakland, did it not?

A. Yes, sir.

Q. Would this be a daily occurrence?

A. Not every day, but for a long while we did operate our own flight between Burbank and Oakland on U. S. Aircoach.

Q. Would you say that was as frequent as five times a week?

A. Just depending on the number of trips we had coming in or whether some other carriers had enough passengers for us to carry. It was strictly a contract basis. It wasn't a regular occurrence. If there were passengers, we went.

Q. If there were available passengers who entered [172] through U. S. Aircoach or some other manner, usually one of the irregular carriers, you would——

A. Set up a flight.

Q. ——set up a flight and transport them to Oakland?

A. That's right.

Q. When that aircraft returned from Oakland

(Testimony of Fritz Hutcheson.)

would it generally also carry passengers from Oakland to Burbank who were destined eastbound on your flight, or some other irregular carrier?

A. Whether they were destined on our flight or any other, we had a combination of eastbound passengers that would come from Oakland to Burbank.

Q. When you referred to looking for the first available carrier to utilize, other than your own carrier, for passengers, would that be only in instances where you had a surplus or more passengers than you could carry on your own flight?

A. Well, in times when we couldn't carry all the passengers on our own flight, as far as going to Oakland is concerned, then we would put them on whatever available carrier that we could get space on. That didn't happen very often. We didn't have that many passengers. We usually had to take them from somebody else to fill up our planes.

Q. The occasions upon which you would transfer or have the ticket agent make arrangements for the onward transportation [173] for other passengers were infrequent?

A. I believe you would say they were infrequent.

Q. Your company did not receive any commissions from the sales of Pacific Southwest Airlines tickets, did it?

A. Sir, that is an accounting problem that I couldn't answer.

Q. Then you did not tell Mr. Stout on any occasion upon which you can remember that that was a fact?

A. That we received a commission?

(Testimony of Fritz Hutcheson.)

Q. Yes.

A. I don't recall. It was strictly an accounting problem.

Q. When a passenger transfer manifest was prepared, would it be done before or after the arrival of a westbound flight from an eastern point in Burbank?

A. I believe that varied. Our stewardesses had instructions at any time that we had passengers going from Burbank to the two destined points, which was usually Oakland and San Diego, our stewardess had instructions as far as the carrier was concerned to prepare a separate manifest showing San Diego and Oakland passengers on separate manifests. Now, sometimes they did, I believe, and sometimes they didn't. When they didn't, I believe the agency in Burbank prepared the manifest.

Q. When the stewardesses prepared those manifests, would [174] they place therein the name of any carrier on which such passengers were going to go to San Diego and Oakland?

A. They would have no idea what they were going on.

Q. That could not be determined by the flight personnel?

A. That was never determined by the flight personnel. They didn't have the slightest idea.

Q. Did any of the personnel of the U. S. Air-coach have any idea what specific carrier would be used for a specific flight?

(Testimony of Fritz Hutcheson.)

A. None whatsoever.

The Court: May I ask a question?

The Witness: Yes.

The Court: When was it determined, then, which carrier was to carry the passenger to San Diego?

The Witness: Our procedure was this: The captain would call from his last stopping point, and he would say, "I have so many San Diego passengers, I have so many Oakland passengers." He would call our flight operations. From that our flight operations would notify the counter and tell them that we have, say, 15 passengers going to Oakland, two passengers to San Diego. Then it would be up to them—they knew what time the airplane would arrive, it would be up to them to secure transportation or notify operations that there were enough passengers to make the Oakland flight, and he would run the DC-3. At that time they would decide—they would immediately [175] start trying to find out who had the first flight going to either destination, if they were going to put them on another carrier other than our own. Most of the times we handled them ourselves. Immediately when the flight came on we had our plane sitting on the ground waiting to take those passengers on with the smaller aircraft.

The Court: When you put them on another line, then your policy was to use the first available flight?

(Testimony of Fritz Hutcheson.)

The Witness: The first available flight that we could get the passengers out on.

Mr. Gardiner: Is that all, your Honor?

The Court: Yes.

Q. (By Mr. Gardiner): When you referred, in the last answer, to putting them on another line, you had reference, did you not, to the ticket agency placing them——

A. The ticket agency would make arrangements for putting them on another carrier.

Q. And would it be a correct statement to state that the late time in determining which carrier was to be used was based upon the variances in weather, both transcontinentally and weather both north and south, which would affect the estimated time of arrival of your flight, as well as coastwise?

A. As well as incoming and as well as the flight going north or south. [176]

Q. So for practical purposes, which carrier you wished to use could not be determined?

A. They couldn't until about an hour before the flight arrived, or operations would check the weather and find out where the airplane was situated, in other words, how close it was to Burbank, through C. A. control, and from that they would judge what time the plane would arrive, and that would be the time they would make arrangements for transportation for the passengers.

Mr. Gardiner: I have no further questions.

The Court: Any questions?

(Testimony of Fritz Hutcheson.)

Mr. Ackerson: I don't believe I have any right to question this witness, your Honor.

Mr. Wright: I have a couple more, your Honor.

Redirect Examination

By Mr. Wright:

Q. In answer to Mr. Gardiner's question, Mr. Hutcheson, I believe you stated that the agency people at Burbank would, upon notification, start making arrangements for the first available onward transportation of incoming passengers?

A. That was the usual procedure, sir.

Q. And what agency were you referring to?

A. Well, during the year of 1953 there was Safe-way Aircoach, American Air Bus, Interstate Air Bus, Metropolitan. [177] I believe those are the different carriers that operated during that period of time.

The Court: I understand that there was only one agency at a time?

The Witness: Only one agency at a time, yes, sir, but different ones handled those flights at different times.

Q. (By Mr. Wright): Those agencies represented U. S. Aircoach?

Mr. Gardiner: I believe that is calling for a conclusion.

The Court: Sustained.

Q. (By Mr. Wright): Did U. S. Aircoach have any agreement with any agent located at Oakland

(Testimony of Fritz Hutcheson.)

Air Terminal? A. I believe——

The Court: Counsel, evidently they had an agreement of some kind.

Do they have any written agreement?

The Witness: I believe that U. S. Aircoach has about 50 or 60 agreements on file with the Civil Aeronautics Board, sir.

The Court: That is written agreements?

The Witness: Yes, and a lot of them are verbal, too.

Q. (By Mr. Wright): Did it have such agreements with the agencies that you just named?

A. As best as my recollection is concerned, I believe [178] that each agency had a written agreement with U. S. Aircoach. I am quite sure they did. I couldn't say exactly sure which ones did and which didn't, but I believe as well as possible my instructions were that the Operations file agreements with all carriers and agencies that we did do business with.

Whether they did or not I couldn't say.

Q. I further understood your testimony, in reply to Mr. Gardiner, that your captain at his last stop before Burbank would notify your flight operations department of the number of passengers that would need onward transportation?

A. He would generally notify either myself or the chief pilot, or whoever happened to be in operations, he would notify them as to how many passengers they had—well, sometimes it wasn't the flight captain, sometimes it would be the agent in

(Testimony of Fritz Hutcheson.)

Kansas City, that was usually the point that they would call from. After the plane had left the agent would call.

Q. You say that sometimes you received calls?

A. I received calls.

Q. When you received such a call what did you do?

A. I usually went back to sleep for a while. It is pretty early in the morning. But about 7:00 or 8:00 o'clock in the morning I would call the counter and tell them how many incoming passengers there were to be off-spaced, or I [179] would call Mr. Blackwell and tell him, because he usually handled them.

Q. Who was Mr. Blackwell?

A. He is an agent that also handled the DC-3 shuttle flight that we had to Oakland, he handled the space on that.

Q. You instructed people at the counter to arrange the onward transportation?

A. They had standing instructions.

Q. Did these agents also represent other air carriers or air lines?

A. Oh, yes, they sold tickets on all the air lines.

Q. Do you know whether they sold Pacific Southwest tickets?

The Court: Of your own knowledge?

The Witness: I assume they did. They sold all the air lines.

The Court: The question is do you know, not what you assume.

(Testimony of Fritz Hutcheson.)

The Witness: I am positive they have sold tickets on Pacific Southwest and all the air lines.

Q. (By Mr. Wright): And California Central?

A. Yes, and all the rest of them, so far as I know.

Mr. Wright: That is all.

Mr. Gardiner: Nothing further.

The Court: May this witness be excused? [180]

Mr. Gardiner: Yes.

The Court: You may be excused.

We will now take a recess until 10 minutes after eleven.

(Recess taken.)

The Court: Call your next witness.

Mr. Wright: I will call Dorothy Laumeister.

DOROTHY LAUMEISTER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Dorothy Laumeister.

Direct Examination

By Mr. Wright:

Q. Miss Laumeister, were you formerly employed by Pacific Southwest? A. Yes, I was.

Q. When were you first employed?

A. June 23, 1953.

Q. In what capacity?

(Testimony of Dorothy Laumeister.)

A. I was employed as a reservationist.

The Court: As a what?

The Witness: Reservationist.

Q. (By Mr. Wright): At what office of Pacific Southwest [181] did you work?

A. At the Oakland office.

Q. That was in June of '53?

A. That is correct.

Q. Subsequently did you work at another office of Pacific Southwest?

A. Yes, sir, I worked at San Francisco.

Q. Where were these offices located?

A. The Oakland office was at the Oakland airport, and the San Francisco office was at the San Francisco airport.

Q. At that time do you know whether or not Pacific Southwest had any ticket offices in downtown Oakland or downtown San Francisco?

A. Not in downtown Oakland, but in San Francisco they have a ticket office downtown at 277 Post.

Q. Is that the office you were employed in?

A. No, sir; I was employed at the field.

Q. At the Oakland office in June of 1953 will you tell us briefly what your duties were?

A. Well, mainly my duties were taking reservations over the phone, mainly, working at the counter, selling tickets, using the teletype machine for sending and receiving messages; and I also made up a bank.

Q. You referred to the teletype machine; what

(Testimony of Dorothy Laumeister.)

were the other stations that you could communicate with by the use [182] of the teletype machine at Oakland?

A. I could communicate with San Francisco, field, Burbank, and then when Long Beach was added to our stops I communicated with Long Beach, and San Diego.

Q. Will you describe for us what the procedure was on handling reservations, which you say you received over the phone? From whom did you receive them, and what were your duties in connection with them?

A. Well, we received calls from various agents, from the other lines that were located there in the building at which we were located in Oakland, and from private parties.

Q. When you refer to the other agents, do you mean independent ticket agents?

A. Some of them were independent ticket agents.

Q. Do you remember the names of any of these agencies?

A. Well, Skycoach, North American, Trans-ocean Airlines, Berkeley Travel, Don Travel, and there was also Sky Tickets.

Q. Did these agencies that you have just named have Pacific Southwest ticket stock?

A. Yes, sir, they did. However—I will change that. I don't believe that North American Airlines carried our stock at the field; the agents downtown carried them. Nor Skycoach at the field.

Q. When you received a call for a reservation

(Testimony of Dorothy Laumeister.)

from, for instance, North American, I believe you said, was that for [183] the purpose of requesting space or confirming space, or what was the purpose of it?

A. Yes, sir, they would call in to the office either over the inter-airport phone, or we may receive a call from downtown, even San Francisco, requesting a certain number of seats to be blocked for their passengers.

Q. And if the space was available you confirmed the request? A. Yes, sir.

Q. Did you have to do any ticketing in connection with those passengers?

A. Yes, sir, we did.

Q. Will you tell just what you did?

A. Well, after blocking the space and having a confirmation from the airline that was requesting the space, we would prepare our manifest and hold that many seats for them, and then the passengers were checked in at our counter and we issued tickets from Oakland to Burbank or San Diego, whichever the destination was, to these passengers.

We did not issue the tickets directly to them. They were held on the manifest, the ticket numbers placed opposite their names, and then the tickets were given to the stewardess.

Q. Was that the regular procedure in every instance? Didn't the passengers ever receive their ticket?

A. Unless they were paying for a portion of their ticket. [184] In most instances it would be

(Testimony of Dorothy Laumeister.)

the tickets by the other airline were paid to Burbank, and then if the passenger wanted to go to San Diego they would purchase their own ticket between Burbank and San Diego.

Q. Did you ever have any requests from North American or Skycoach for space for passengers connecting with other flights at Burbank?

A. Yes, sir, I believe we did.

The Court: Keep your voice up, please. Counsel can't hear you, and they are entitled to hear.

Q. (By Mr. Wright): Going back to your previous answer, the payment for tickets, I don't think I quite understood it. You said something about when they are paying for their own transportation.

A. Their own transportation—if they wished to go beyond Burbank, I am speaking right now of what I have in mind is Transocean who terminate their flight in Burbank, and if the passenger wished to go on to San Diego from Burbank, they would have to purchase their own ticket from Burbank to San Diego.

Q. And the Transocean flights that you are referring to would originate where?

A. Some of the flights originated in Honolulu, some of the flights also originated as far as Japan and Guam, Honolulu. [185]

Q. In connection with those flights did you get requests for space from Transocean?

A. Yes, sir, we would.

Q. That would be in advance of the arrival of the flight?

A. Yes, sir, that's right.

(Testimony of Dorothy Laumeister.)

The Court: May I ask a question?

When you would get a request from Transocean or from United, or any other airline, for space, either from Burbank to San Diego or from Oakland to Burbank, would you have any information as to where the passenger originated?

The Witness: No, not any direct information, no, sir.

The Court: No direct information?

The Witness: No.

Q. (By Mr. Wright): Did you have anything to do with collections on ticket sales made in Oakland and San Francisco? A. Yes, sir.

Q. Will you tell us what you did in that connection?

A. After the passengers had checked in to the counter we knew the exact amount of people who were going, how many full fares, how many half fares, we would make out, first of all, a tax form showing that Transocean, North American, whoever has blocked the space, will pay the tax, and then we make out an exchange order showing how many passengers, full-fare passengers, how many half-fare passengers, were on the [186] flight, the flight number, the date and the destination, and then we would bill or take that directly to the air lines that had requested it, and they would, in turn, give us a check.

Q. By exchange order do you refer to the type of document which is marked "Exchange Order" on this Exhibit No. 2?

(Testimony of Dorothy Laumeister.)

A. Yes, sir, that is what we used.

The Court: I am sorry. Money talks, but money is not talking very loud. Will you speak out, please?

The Witness: I am sorry. The answer was yes.

The Court: All right.

Q. (By Mr. Wright): You say in connection with these passengers this exchange order would be made out after the passengers had been checked in?

A. As a rule, sir.

Q. What tickets would the passengers present at the time they checked in?

A. The only times that I can remember having other tickets presented were from Transocean passengers. Those tickets were brought to us so that we could get the names and the weight of their baggage.

Q. And these people whom you just described as checking in, the space requested and confirmed to North American, they presented no tickets?

A. No, sir, they did not. [187]

Q. Did you have some means of identifying them?

A. Yes, they would have—usually have their tickets, but we did not have to validate them or add anything to them.

Q. Would they have a Pacific Southwest ticket?

A. No, sir, they would not.

Q. What kind of ticket would they have?

A. They would have their ticket from the air line on which they were going from Burbank to the East.

Q. You mean if the space was requested and

(Testimony of Dorothy Laumeister.)

confirmed by North American, the passengers would present a North American ticket?

A. For the various flights, yes.

Q. Which would show Oakland or San Francisco as the origination?

A. I couldn't answer that. I never examined one that closely, sir.

The Court: May I ask a question?

Do you know of your own knowledge—now, I don't want you testify as to what you presume or what you think—but do you know of your own knowledge where a ticket has been sold to a passenger going East from Burbank to the eastern destination, and then the airplane company has purchased from Pacific Southwest a ticket from Oakland to Burbank, do you know that of your own knowledge?

The Witness: Will you say that again, [188] please?

The Court: Can you read it, please? Maybe I didn't say it very clearly.

(The question was read by the reporter.)

The Witness: When they request the space, they purchase the ticket, because they give us the check for the ticket.

The Court: When they purchase the space, do they tell you that this is a part of a flight to the East?

The Witness: Not in those words, no.

The Court: What do they tell you?

(Testimony of Dorothy Laumeister.)

The Witness: They call up and say that they want so many seats to Burbank.

The Court: That is all they tell you?

The Witness: Yes.

The Court: And then when the passenger shows up, does the passenger show you the ticket that he has got for the eastern flight, or he just says, "My name is So-and-So and I have a reservation here to Burbank"?

The Witness: It is handled in various ways. We have people go to ticket their eastern flight and then come to Pacific Southwest to check in on our flight to Burbank. And also we have received the names of the passengers from the other airline, and the people would check in at our counter just to get their gate passes.

The Court: Let me ask you, as an ordinary thing did you know that these passengers from other air lines, that is, from [189] Oakland, going from Oakland to Burbank, were starting on a trip East—would you know that?

The Witness: Yes, I would know it.

The Court: As a general rule?

The Witness: Yes, I would.

The Court: And the trip from Oakland to Burbank was only the first step of this trip?

The Witness: Yes, that's right.

Q. (By Mr. Wright): In connection with this space that was purchased by these other air lines, had you ever received any instructions from your

(Testimony of Dorothy Laumeister.)

company as to any policy with regard to that procedure?

A. Well, we were requested to accept these reservations and blocking of space for the air lines, to co-operate with them.

Q. Do you know from whom those instructions came?

A. They came from the main office in San Diego.

Q. In connection with the teletype that you mentioned, did you ever get any inquiries on that teletype from San Diego regarding the amount of space sold on any particular flights?

A. Would we get any what, sir?

Q. An inquiry from San Diego—that was the main office, wasn't it? A. Yes. [190]

Q. —regarding the space sold or available on any of these particular flights?

A. Yes, sir, we would.

Q. Did you ever receive over the teletype any instructions regarding blocking out any space for these flights? A. In what respect?

Q. For a particular group or for any particular purpose that was handled through San Diego rather than directly to your office?

A. There have been occasions when we have.

Q. Have there been any occasions when flights were delayed to accommodate any of these agencies or other air lines?

A. Yes, sir, there have been occasions.

Q. Would those delays be your responsibility or

(Testimony of Dorothy Laumeister.)

did you receive instructions specifically with regard to each such instance from some other source?

A. We would have to receive instructions from some other source.

Q. And where would that come from?

A. That would come from San Diego, from one of the dispatchers.

Q. And that would be by teletype?

A. Yes, sir.

Q. Do you recall any particular instances when that [191] occurred?

A. I recall one, the Transocean Airlines, where the flight was delayed 30 minutes, because the flight from Honolulu was delayed and did not arrive on time.

Q. And your instructions to hold came from San Diego by teletype? A. Yes, sir.

Q. Are you presently employed?

A. Yes, sir, I am.

Q. By whom?

A. Airline Reservations in San Diego.

Q. And for how long have you been employed by Airline Reservations?

A. Since the 28th of June.

Q. And what is Airline Reservations?

A. It is a ticket agency.

Q. In what capacity are you employed there?

A. I am the ticket agent.

Q. Where is Airline Reservations located in San Diego?

(Testimony of Dorothy Laumeister.)

A. It is located on the Plaza, 341 Plaza, in the Western Union office.

Q. Is it a separate office from the Western Union office?

A. Yes. It is more or less of a corner of the lobby in the Western Union office. [192]

Q. And you are presently selling tickets for air lines?

A. Yes, sir.

Q. And for what air lines are you now selling tickets?

A. We handle tickets for North American Airlines, for Skycoach, for Transocean Airlines, for California Central, and for Pacific Southwest.

The Court: Now, may I ask this witness a question?

Supposing the customer comes into your office and wants a ticket to New York, the flight originates from Burbank, and you call up Pacific Southwest for a reservation from San Diego to Burbank, what do you tell Pacific Southwest?

The Witness: I request a space from San Diego to Burbank.

The Court: Do you tell Pacific Southwest, "This is a passenger that is going to New York"?

The Witness: No, as a rule I don't, sir.

The Court: Just that you want space from San Diego to Burbank?

The Witness: Yes, that is correct.

Q. (By Mr. Wright): Do you have any idea what the average volume of ticket sales is at the Airline Reservations office where you are now em-

(Testimony of Dorothy Laumeister.)

played? A. No, sir, I don't know.

The Court: You sell several, don't you?

The Witness: Oh, yes.

Q. (By Mr. Wright): When a person comes into the office [193] in San Diego where you are presently employed and buys a ticket or buys transportation from San Diego to New York City, what procedure do you do? How do you handle that request? How do you ticket?

A. When they request a space, of course they immediately want to know what time they will depart San Diego, and we tell them that they will be departing either 6:15 or 6:35, then we request the space from Skycoach or North American, wherever the destination is of the passenger and which line they are booked on, and the space from Pacific Southwest or California Central, then we make out a ticket via North American or Skycoach, and the ticket reads from Burbank to the destination, but the fare quoted is the fare from San Diego to the destination. We then issue another ticket either on Pacific Southwest or California Central and we ask them to check in at the counter 30 minutes before flight time, they will go to Burbank and change planes, check in at the Skycoach counter for their passage East.

The Court: Now may I ask a question?

You issue two tickets?

The Witness: That's right.

The Court: Now, do you put the second ticket—do you attach the second ticket to the first ticket?

(Testimony of Dorothy Laumeister.)

The Witness: We do not at that office, sir.

The Court: You don't paste it on? [194]

The Witness: No. We put it in a separate folder.

The Court: In a separate folder?

The Witness: Yes, sir.

Q. (By Mr. Wright): Are the tickets always placed in separate folders?

A. Unless we don't have a Pacific Southwest or a California Central **folder**.

Q. And when you don't have one or the other, then what do you do?

A. It is placed in the same envelope.

Q. What does the passenger pay in the way of fare?

A. His fare is from San Diego, the fares for Skycoach, especially, are from San Diego to their destination in the East.

Q. That is the total amount that is paid by the passenger?

A. That is correct.

Q. The Skycoach fare plus tax?

A. Yes.

Q. The passenger does not, then, pay a separate fare for the Pacific Southwest or Central ticket?

A. No, sir, he does **not**.

Q. Do you know what commission basis Airline Reservations works on?

A. They have a commission from Pacific Southwest and [195] California Central, also commission from North American and from Skycoach.

Q. Do you recall offhand what the Skycoach fare is from San Diego to New York?

A. I believe it is \$108.90.

(Testimony of Dorothy Laumeister.)

Q. Does that include the tax?

A. That includes the tax, yes.

Q. That would be a one-way ticket?

A. One-way ticket.

Q. That is the amount that you would collect from the person buying a one-way ticket from San Diego to New York?

A. Yes, that is correct.

Q. How much of the \$108.90 is remitted by Airline Reservations to Skycoach?

I will withdraw that question.

The Court: I assume that you remit to Skycoach its part of the ticket, and to Pacific Southwest its part of the ticket, and you retain your commission?

The Witness: We retain the commission from each.

The Court: You retain the commission from each?

The Witness: Yes, sir. There are individual reports sent to each air line.

Q. (By Mr. Wright): In reporting the sale of that ticket, that Skycoach ticket, on your sales report, is your sales report made daily or [196] weekly?

A. It is made weekly.

Q. In that sales report what would you show, if anything, in connection with the San Diego to Burbank fare?

A. I can't answer that. I haven't done enough of the bookkeeping there to know how that is handled.

(Testimony of Dorothy Laumeister.)

Q. In any event, there is no separate fare paid by the passenger? A. By the passenger, no.

Mr. Wright: I have no further questions.

The Court: Cross-examine.

Cross-Examination

By Mr. Gardiner:

Q. Miss Laumeister, you were testifying as to working for Pacific Southwest in San Francisco and Oakland; while employed there I presume you became familiar with which of the irregular carriers had flights from Burbank to either of those airports? A. Yes, sir.

Q. Did any of them have flights to San Francisco Airport? A. No, they did not.

Q. Do you know now through your previous employment whether any of those irregular carriers have flights from San Francisco to Burbank? [197]

A. I don't believe any of the irregular carriers go to San Francisco.

Q. They all go to Oakland? A. Yes, sir.

Q. You spoke of the term blocking out space, when you were an agent for Pacific Southwest; will you explain that somewhat technical term for us?

A. They would call and say that they wanted 19 seats held, that is just taking a figure, we would hold 19 seats out of our space that we were holding at Oakland, and would not book any passengers in that space. We would hold that space for the air line that requested it, and they would give us the names

(Testimony of Dorothy Laumeister.)

for those spaces that we held. I am speaking of a reservation **card**.

Q. In other words, the **blocking off is the making** of a reservation? A. Yes, it is.

Q. You would reserve 19 seats?

A. That is correct.

Q. When you say you did that for the air line, did you mean the air line or the agency?

A. We received those requests from the air line there in Oakland. They had their offices there.

Q. Which air line is that?

A. North American, Transocean, or Sky-coach. [198]

Q. By North American, do you know the full name of that organization?

A. North American Airlines.

Q. Could it be North American Airlines Ticket Agency?

A. No. We held it under North American Airlines.

Q. Do you know if there are two companies by that name? A. I don't know, sir.

Q. Have you any information as to the names of the companies operating flights on which North American Airlines Ticket Agency sends passengers?

Mr. Wright: I object to that, if it please the Court. That is assuming facts not in evidence.

The Court: The question is do you know.

She may answer it yes or no.

The Witness: No, I don't, sir.

Q. (By Mr. Gardiner): You are not familiar

(Testimony of Dorothy Laumeister.)

with that? A. No, sir.

Q. All you recall is that you would receive requests for space from North American?

A. From the North American Airlines at the airport.

Q. Which airport? A. Oakland Airport.

Q. Would you receive requests from their city ticket office? [199] A. Yes, we would.

Q. And going back, again, to the reservation or blocking off, if a business concern in San Francisco with whom you had done business in the past would call up and ask for, say, eight seats or ten seats, would you similarly reserve them for them?

A. If it was a private party we would reserve them. We would need their names. And also, in order to hold them until flight time they would have to pick up their ticket before time.

Q. But, as I stated in my question, if you knew the party you would hold it for them a reasonable length of time? A. Yes.

Q. And if an individual called up and said, "I would like to go to Burbank," or "Long Beach," you would block off or make a reservation for that passenger?

A. Would you repeat that, please?

Mr. Gardiner: Would you read the question?

(Question read by the reporter.)

The Witness: We would make a reservation for them.

Q. (By Mr. Gardiner): You mentioned that

(Testimony of Dorothy Laumeister.)

tickets were not in all instances given to—withdraw that.

The North American Company to which you were referring would also purchase tickets, would it not, for passengers who wished to go to San Diego from Oakland or San Francisco? [200]

A. They would purchase tickets.

Q. Would they make a reservation for passengers who wished to make a flight?

A. From the agencies downtown they would, yes.

Q. In other words, North American sold tickets on Pacific Southwest at that time—

A. Their agency, yes.

Q. —for persons who were engaged in purely intrastate flights? A. Yes.

Q. And they did a considerable amount of business on that basis, did they not?

A. We did not receive too many requests from North American from the downtown Oakland or San Francisco office for individual space. Most of the requests came from the various travel bureaus.

Q. At that time PSA had a downtown ticket office in San Francisco, did they not?

A. In San Francisco, yes.

Q. You referred to Transocean; do you know the full name of that company? A. The full name?

Q. Of Transocean.

A. Transocean is the only way that I know them by.

Q. With respect to your testimony that tickets were not [201] always given directly to passengers

(Testimony of Dorothy Laumeister.)

for whom space had been reserved by North American, was that because the tickets had not been paid for?

A. They were not given to the passengers because they were given to the stewardess. Their passage—Transocean on the ticket shows from the origination, which would be Honolulu, or Wake, to Burbank, and they would come to our office and we would issue a ticket number to them, and they would never see the ticket, the passenger would never see the ticket.

Q. Was the reason for that because there was a sizeable number of them and it simplified things to give them directly to the stewardess?

A. I don't know about that, sir. I know that the practice was to keep the tickets—like from my drawer I would issue so many tickets for the amount of people, the ticket number was placed opposite their names on the manifest, and the tickets held and given to the stewardess.

Q. The ticket was given to the stewardess for each passenger? A. They were all together, sir.

Q. But if there were ten passengers she would have ten individual tickets? A. Yes.

Q. And those were PSA tickets? [202]

A. Yes, sir.

Q. I believe you testified that when an agency requested—withdraw that.

I believe you stated that Skycoach, after they made reservations, had requested a number of reservations, and the passengers had been trans-

(Testimony of Dorothy Laumeister.)

ported, you would deliver to Skycoach an exchange order of the type shown you? A. Yes, sir.

Q. Was that used as a billing device or method to indicate to Skycoach the amount of money owed to PSA?

A. Yes, it was, sir. We would make two copies; one was retained by Skycoach, the other was put into my cash report, if the tickets came out of my drawer, along with the check, and sent down to be banked.

Q. Those two copies would thereby give each office a record of the payment? A. Yes, sir.

Q. You mentioned that North American also sold some tickets on Pacific Southwest Airlines to passengers who were only going to Burbank?

A. From the agents downtown, yes.

Q. Would the agent indicate whether or not the passenger was going any further than Burbank?

A. As a rule, no.

Q. Then there was no way of your telling when a ticket [203] agency called up and asked for space to Burbank whether or not the passenger was going on to Long Beach or was going to make a stopover and go on to San Diego, or he might go East, or in any other direction?

A. Well, there were stopovers, yes. They would say where they were stopping over.

Q. But if the ticket was only to Burbank?

A. If the ticket was only to Burbank, no.

Q. You spoke of a North American Airlines ticket form. You don't happen to have one of those

(Testimony of Dorothy Laumeister.)

with you, do you? A. No, sir, I do not, sir.

Q. Are you familiar with the form, the interline form?

A. Pretty much so. I have not sold as many North American tickets as I have Skycoach. I am much more familiar with the Skycoach ticket.

Q. Is it correct that that North American ticket form is given to the passenger and is used by him to procure a flight coupon when he arrives at Burbank?

A. Yes, we give them the ticket, and they are to present that at the ticket counter in Burbank, and that is their flight, their ticket to their destination.

Q. That same ticket is used to carry them to their destination?

A. Yes, it is a regular ticket form.

Q. Are you aware of any document entitled Flight Coupon [204] issued on North American stock? A. I don't quite know what you mean.

Q. You mentioned the fare of Skycoach, Miss Laumeister, from San Diego to New York, and I believe you quoted the figure of approximately \$108 one way; do you know what the fare charged by Skycoach is for a one-way ticket from Burbank to New York?

A. No, I don't, sir. All of our fares are from San Diego. They do have a breakdown, but I haven't had an occasion to use it.

Q. The fare from Burbank to New York would be lower than—as a result of that breakdown—than from San Diego?

(Testimony of Dorothy Laumeister.)

A. I assume it would, sir. I don't know. I can't say for sure.

Q. Does Skycoach have what they call excursion flights? A. Yes, they do.

Q. Are those excursion flights good for passage from New York to Burbank—to San Diego, or only to Burbank?

A. Those excursion flights, the fare is quoted from San Diego. However, they purchase—they must pay extra for the fare from San Diego to Burbank on an excursion.

Q. And that extra amount would be the amount of the carrier used selected by the agent to take that person from San Diego to Burbank?

A. Yes. However, as I say, the fare that we quote and [205] the fare that I have is the fare from San Diego to New York, and return. It is good only on a round trip.

Q. But to get up to Burbank they have to pay an additional amount?

A. There is an additional fare.

Mr. Gardiner: No further questions.

The Court: Any other questions?

Mr. Ackerson: Your Honor, this young lady didn't testify about my client at all. I don't think I can cross-examine her.

Redirect Examination

By Mr. Wright:

Q. If I understood your answers to Mr. Gardiner's questions, you say that the passenger does pay

(Testimony of Dorothy Laumeister.)

an additional fare when he buys a round-trip excursion ticket? A. Excursion tickets, yes.

Q. And that is the lowest fare that is available, is it not? A. Yes, sir, that is correct.

Q. I think you testified previously that Airline Reservations, where you are presently employed, also sells California Central tickets?

A. Yes, sir.

The Court: That is not proper redirect. You are going into something that wasn't opened up at all on cross-examination. [206]

Mr. Wright: I agree with that, but I want to use this witness for testimony in connection with California Central. That is one of the reasons that I waited.

Mr. Ackerson: I think the attempt comes belatedly.

The Court: Well, he might have been misled.

Mr. Ackerson: It is all right, your Honor. I won't object.

The Court: All right.

Mr. Wright: I thought that was the procedure we were following yesterday.

The Court: The answer was yes?

The Witness: Yes.

Q. (By Mr. Wright): Is there any difference in the procedure that you would handle in ticketing a Skycoach passenger on a California Central flight between San Diego and Burbank than the procedure you have already testified to regarding Pacific

(Testimony of Dorothy Laumeister.)

Southwest? A. No; the procedure is the same.

Q. There are two tickets issued?

A. Yes, sir.

Q. What instructions regarding checking in do you give the passenger at the time you ticket them?

A. We advise them to go—if it is on California Central, to check in at the California Central Airlines ticket [207] counter, passenger service counter, at Lindbergh Field, 30 minutes prior to flight time.

Q. That is after you have confirmed the space?

A. Yes, that is after confirmation.

Q. These tickets are being sold every day?

A. Yes, sir.

Mr. Wright: That is all.

Mr. Ackerson: No questions.

The Court: May this witness be excused?

Mr. Wright: Yes.

Mr. Ackerson: Yes.

The Court: May I inquire how many more witnesses you have?

Mr. Wright: Your Honor, I still have five left.

The Court: Well, they grew overnight.

Mr. Wright: Yes, they did.

The Court: Well, then, we had better come back at 1:30.

Mr. Ackerson: If your Honor please, I wonder if there is any chance at all of getting through today.

The Court: I don't know. Your guess is as good as mine.

Mr. Ackerson: I don't see how we can conceivably get through.

The Court: We will come back at 1:30 and find out. Court will stand at recess now until 1:30 o'clock.

(Whereupon at 12:00 o'clock noon a recess was taken until 1:30 o'clock p.m. of the same day.) [208]

Friday, July 23, 1954, 1:30 P.M.

The Court: Call your next witness.

Mr. Wright: Stephen C. Russell.

STEPHEN C. RUSSELL

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name.

The Witness: Stephen C. Russell.

The Clerk: S-t-e-p-h-e-n?

The Witness: Yes.

Direct Examination

By Mr. Wright:

Q. Mr. Russell, were you formerly in the employ of Pacific Southwest? A. Yes, sir, I was.

Q. And in what capacity?

A. As copilot and captain.

Q. When did you commence your employment with Pacific Southwest?

A. With the Airlines, approximately July 14 of 1951.

(Testimony of Stephen C. Russell.)

Q. And were you in their employ for a period during 1953? [209] A. Yes, sir, I was.

Q. In what capacity at that time?

A. As captain, flight captain.

Q. What route or routes of Pacific Southwest did you operate as a captain?

A. From San Diego to San Francisco, Oakland, and the intermediate stops, namely, Long Beach and Burbank.

Q. Can you tell us how the dispatching is handled for Pacific Southwest, or was, at least, during the time that you were captain in '53?

A. Well, it was the captain's responsibility to check the weather, and of course the number of passengers, in order to determine gas load and so forth, to check the routing that he desired, and see if it coincided with the dispatcher on duty; and after the airplane was fueled and loaded with passengers and baggage, to check and see if the weights, baggage, and so forth corresponded to what was on the weight balance, and have the dispatch signed by the dispatcher captain, and that was it, you were on your way.

Q. Was the dispatching done at each station?

A. The dispatching was primarily done at San Diego. However, dispatching was relayed up and down the entire route that Pacific Southwest fly, by teletype machine.

Q. During the period in 1953 when you were a captain, did you have any additional duties, other than command of the [210] aircraft during flight?

(Testimony of Stephen C. Russell.)

A. Well, yes, sort of. It was the company policy of public relations with the passengers.

Q. Do you mean to make announcements to the passengers?

A. Yes, sir, we would make announcements pertaining to weather, the route we were flying, altitude, any points of interest, time of departure, where the passengers may claim their luggage, and so forth and so on.

Q. Did you as a captain or as an employee of Pacific Southwest have any duties in connection with baggage?

A. Yes, sir.

Q. What were those duties?

A. Duties of the pilots, according to company policy, was to segregate and store baggage on the airplane itself, in order that there may be an expedient method of relieving the load at your destination or at the particular passenger's destination.

Q. On the flights which you captained, and which stopped at Burbank, was there any special method of handling the baggage?

A. Well, there was in one sense. In Burbank and Oakland. However, the other stops were about the same. For instance, San Diego, Long Beach and San Francisco. But Oakland and Burbank is where we had our transfer of transcontinental luggage, which wasn't exactly normal as far as we were [211] concerned in handling the luggage.

Q. How was that handled?

The Court: May I ask a question?

What do you mean by transcontinental luggage?

(Testimony of Stephen C. Russell.)

The Witness: Your Honor, passengers holding luggage that was going on from Burbank to points east, or from Oakland points west.

The Court: The baggage was marked, was it, as it went on the plane?

The Witness: Yes, sir, it would have to be, otherwise we wouldn't know where it got off.

The Court: How was it marked?

The Witness: Well, as an example, Pacific Southwest had a ticket or a baggage claim check and identification tag, which the passenger retained a portion thereof in order to claim the baggage at the destination, and each ticket was of a different color and had the designation or abbreviation of the particular station. As an example, Long Beach would be LGB, which in air line language is Long Beach.

The Court: How did you mark your transcontinental baggage?

The Witness: Well, transcontinental baggage we would—as an example, at times there would be two baggage tags, there would be one on there from the transcontinental air line or transoceanic [212] air line——

Mr. Gardiner: I would like to move that the witness' answer be stricken as not responsive. The question was how did he mark it or how did the carrier mark it?

The Court: How did you mark it? Was it marked with different colored tags?

(Testimony of Stephen C. Russell.)

The Witness: Your Honor, I didn't mark it, if that is the question.

The Court: Do you know how it was marked?

The Witness: Yes, that is what I am trying to relate.

The Court: Was it marked with different colored tags?

The Witness: Yes, sir, it was marked with different tags.

The Court: Transcontinental had a different tag?

The Witness: On most occasions, yes.

The Court: Where were the transcontinental tags put on? Were they put on by Pacific Southwest?

The Witness: No, sir. If the passenger was going from the west to east, then on 90 per cent of the occasions we were the only one that had a baggage tag on the baggage until it arrived at the point of transfer, which in that case would be Burbank. However, on westernbound flights the baggage got off the transcontinental, or—that's right, the transcontinental airplane would naturally have the baggage tag on it from the transcontinental airplane, so therefore on many occasions we wouldn't have to put one of our tags on it.

The Court: I understood from other witnesses that assuming [213] that a passenger came in from the East to Burbank, that the passenger would be unloaded, the baggage would be unloaded, and it would have to be claimed by the passenger. Now, wouldn't the tags come off at that time?

(Testimony of Stephen C. Russell.)

The Witness: No, sir, that isn't exactly true, you see.

The Court: Well, do you know what the procedure was?

The Witness: Yes, sir, I certainly do.

The Court: What was the procedure?

The Witness: I handled it every day.

The Court: What was the procedure?

The Witness: There were two procedures. No. 1 was that on occasions the passenger would, as an example, a hypothetical example, a passenger coming in from Chicago that was destined for San Diego, he would arrive Burbank, get off the airplane, claim his luggage, check into Pacific Southwest, board our airplane, Pacific Southwest with our claim check and baggage tag, you see, and then go on to San Diego and then reclaim his baggage when we arrived at San Diego. However, the other course that we used, and we used to use it quite a bit up until late '53, which for some reason it was changed, however when we were in a big hurry and behind schedule, and had a lot of transcontinental passengers, therefore the people would come right off the transcontinental airplane without going through a gate, and right on to our aircraft, you see, in other words, what we call field transfer, [214] and the baggage would be done the same way, therefore the porter would take the baggage off the transeontinental airplane, and the one throwing down would holler, "San Diego," "Oakland," "San Diego," "Oakland," you see, or "Burbank." Therefore the porter that got all the

(Testimony of Stephen C. Russell.)

San Diego baggage would bring it directly to our aircraft and hand it up to us and we stowed it in the airplane itself.

The Court: He didn't retag it, then?

The Witness: No, didn't have to, because it had a tag on it already from the transcontinental carrier.

The Court: Was that a regular custom, to field-load from one plane to the other?

The Witness: Only when we were in a hurry or behind schedule.

The Court: Was that something that was done infrequently?

The Witness: Yes, sir, I would say so, depending on the situation.

The Court: But the ordinary procedure was for the passenger to disembark, claim his baggage, and go over to the Pacific Southwest and recheck the baggage?

The Witness: Now, there again there arises something else. Because up until late '53 they very seldom claimed their luggage, we advocated they didn't to expedite the transfer, and upon arrival in Burbank, as an example, if we were transferring passengers from our airplane to a [215] transcontinental airplane, we would advise them in our little farewell speech, after thanking them for riding with us, that they would transfer from our airplane to North American, or Skycoach, whoever the other carrier may be, we would know prior to landing, you see, and advise them of that, and not to worry about their luggage, that their luggage would be automatically taken care of.

(Testimony of Stephen C. Russell.)

That was part of our duties.

The Court: That policy was changed, was it?

The Witness: Yes, in the latter part of '53.

The Court: So that the passenger had to pick up his own luggage?

The Witness: Actually we were told it was changed, but I imagine—well, I won't imagine, I won't assume or imagine anything.

The Court: I imagine you can fly, but I am not certain.

The Witness: I will only state what I know, and I know that up until, I would say approximately October or November of '53, that was done constantly. However, after that I had no knowledge as to the exactness.

The Court: That was done constantly—what do you mean by that?

The Witness: What we were talking about.

The Court: Tell me.

The Witness: The transfer of baggage, sir, [216] without the passenger transferring it himself.

The Court: Who would transfer the baggage—the incoming flight?

The Witness: Well, as an example, at Burbank they have what they call a porter pool. The nearest of my recollection and understanding is that it works out of a pool, and whenever an airplane comes in the flight is announced and the porters that aren't working come out and take care of that particular airplane. Now, on our side, Pacific Southwest's side, the porters would hand the baggage up

(Testimony of Stephen C. Russell.)

to the pilots, which were up in the airplane at the time, and they stowed the baggage as they wanted it, you see, in order to expedite unloading, again.

Q. (By Mr. Wright): On northbound flights from San Diego to Burbank, was there any company policy with regard to announcement to the passengers after landing or just before landing, before deplaning?

A. Yes, sir, we made our farewell speech to the passengers and advised them where they could get their luggage, and there, again, up until about November of '53, we used to announce that those that were transferring on to easernbound flights, where they would contact their next—or make their next arrangements to transfer, which would be whatever counter they were supposed to report to.

Q. And you say that that announcement was made according [217] to a company policy?

A. It was made by company request, yes, sir.

Q. Who made the request or gave you the instructions to make that announcement?

A. Mr. Friedkin, Mr. Leonard, Mr. Andrews, Mr. Wood, several, at open pilot meetings.

Q. It was made at open pilot meetings?

A. Yes, sir. As a matter of fact, I got reprimanded for not doing it, so I know very well.

Q. Just answer the questions. Did you at one time also work for an organization known as Airlines Tickets, Inc.?

A. Yes, sir, I did.

Q. Where is that located?

(Testimony of Stephen C. Russell.)

A. Well, I don't know if they are still in existence or not; however, at the time I worked for them I took my schooling at 707 Broadway, here in Los Angeles, South Broadway, I believe, and their office in San Diego was at 1044 Fourth.

Q. When were you working for that organization?

A. In 1950, '51, I believe. Prior to going with Pacific Southwest Airlines.

Mr. Gardiner: Your Honor, it seems to me that employment that far back is so far removed from the issues in this case.

Mr. Wright: I am not going to pursue it any further.

The Court: I haven't any question yet. If the question is too remote you can object to it. [218]

Mr. Wright: I thought that employment was more recent. I am not going to pursue it, Judge.

The Court: All right.

Q. (By Mr. Wright): Have you on any flights on which you were captain been diverted from Burbank, Lockheed Air Terminal, to some other airport in a non-scheduled stop?

A. I don't understand your question, sir.

Q. On any flights that you had which normally would stop at Burbank, have you received orders to divert that flight to some other airport?

A. Yes, sir, I have.

Q. Do you recall any specific occasion when that happened?

The Court: I assume when Burbank is fogged

(Testimony of Stephen C. Russell.)

in, and Burbank does get fogged in sometimes, that they would be diverted to some other airfield. That is true, isn't it?

The Witness: Well, I have a case——

The Court: Burbank does get fogged in, doesn't it?

The Witness: Yes, sir.

The Court: When it is fogged in you can't land and you have to be diverted to some other airfield?

The Witness: However, on one occasion I was diverted by dispatch——

Mr. Gardiner: I would like to move that the witness' answer be stricken as not responsive. [219]

The Court: I would suggest that the witness not volunteer anything and just answer the questions.

Q. (By Mr. Wright): Were there any instances when the flight of which you were captain was diverted for the purpose of meeting the connecting carrier?

A. Not while I was captain, no, sir.

Q. Co-pilot? A. Yes, sir.

Q. Do you recall about when that occurred?

A. The last one that I can remember was December of '52.

Q. Can you tell us what happened?

A. As I recall it, I made a notation in my log book, I usually did when there was anything irregular, and I judged that as irregular, we were sent to Palmdale in preference to Burbank, because we were supposed to meet flights at Palmdale that

(Testimony of Stephen C. Russell.)

prior to that couldn't get into Burbank. However, at our arrival time at Burbank we could have gotten in, the weather had lifted, but these other planes with connecting passengers were at Palmdale, and therefore we had to land at Palmdale to make our transfer.

Q. Did you receive these instructions in flight?

A. In that particular case, yes, sir, by aeronautical radio.

Q. What is aeronautical radio? [220]

A. To the best of my knowledge that is a company radio.

Q. For in-flight communications?

A. Yes, sir.

Mr. Wright: I have no further questions.

Mr. Gardiner: No questions.

The Court: No questions?

Mr. Gardiner: No, your Honor, no cross-examination.

The Court: You may step down.

May the captain be excused?

Mr. Wright: He may

Mr. Gardiner: We will not require him.

The Court: All right; he may be excused.

Mr. Wright: Call Mr. Stout.

JOSEPH W. STOUT, JR.

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Joseph W. Stout, Jr.

Direct Examination

By Mr. Wright:

Q. Mr. Stout, you are employed by the plaintiff?

A. Yes. [221]

Q. In what capacity?

A. Air transport examiner.

Q. Briefly, what are your duties?

A. Conduct investigations to determine whether persons engaging in air transportation are complying with the Civil Aeronautics Act.

Q. In the course of your duties did you have occasion in September and October of 1953, to investigate the operations of California Central Airlines?

A. I did.

Q. In the course of that investigation did you visit the Lockheed Air Terminal at Burbank?

A. Yes.

Q. Did you visit the offices of any carriers at Lockheed Air Terminal in Burbank?

A. Yes.

Q. Do you recall whether you visited the offices of North American at Lockheed Air Terminal, Burbank?

A. I did.

Q. When was that?

(Testimony of Joseph W. Stout, Jr.)

A. During October of 1953.

Q. On that occasion did you examine any of the records of North American? A. I did.

Q. And in the course of that examination did you make [222] photostatic copies of some of the records of North American? A. I did.

Mr. Wright: May this document be marked for identification as Plaintiff's Exhibit——

The Court: Is this for Central?

Mr. Wright: Yes.

The Court: That will be 6.

The Clerk: No. 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6, for identification, in case No. 16755.)

Q. (By Mr. Wright): Mr. Stout, will you tell us if there are any particular records of North American's that you examined in the course of your investigation? A. Yes.

Q. What were they?

A. They were the passenger manifests on the North American east-west transcontinental flights, the passenger tickets used on those flights, the transfer manifests from those flights to continuing carriers at Burbank, certain requests for checks in payment for the continuing transportation from Burbank, certain ledger cards, and that is about it.

Q. Did you examine these documents or that particular group of documents for a certain period

(Testimony of Joseph W. Stout, Jr.)

of time? Covering what period did you make the examination? [223]

A. August, September and October, 1953.

Q. Did you make photostatic copies of some of those documents? A. I did.

Q. I show you Plaintiff's Exhibit marked No. 6 for identification, which purports to be photostatic copy of certain documents and ask you whether or not it was made by you? A. It was.

Q. And where was it made?

A. At Lockheed Air Terminal in the office of North American Airlines.

Q. Does it constitute a fair and accurate reproduction of the original documents?

A. It does.

Mr. Wright: I offer Exhibit No. 6 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 6.

(The document, marked Plaintiff's Exhibit 6 for identification, in case No. 16755, was received in evidence.)

Q. (By Mr. Wright): Mr. Stout, I ask you to examine Plaintiff's Exhibit No. 6, and if you can, tell us what the original documents of which that is a photostat consisted of? [224]

A. This document is a transfer manifest listing the passengers who arrived Burbank on North American Airlines flight 600 on October 1, 1953, and were transferred at Burbank to California Central

(Testimony of Joseph W. Stout, Jr.)

flight 534 for continuing transportation to San Diego.

Mr. Ackerson: If your Honor please, I don't like to disrupt this, and I realize this may be slightly out of turn, but I see nothing on that document that says it was transferred to California Central. Maybe they were, but that is the danger of this type of testimony. In other words, letting a witness tell what a document should state. The document doesn't state that as I read it.

The Court: Well, the document is the best evidence of what it contains. Let me see it, please.

There is a notation on the top of it that says, "From Cal. Central."

Mr. Ackerson: That is not the California Central manifest, as I understand it.

The Court: Let's ask the witness. Maybe the witness can read better than I can.

What does it say?

The Witness: It says "From Cal. Central."

The Court: I thought you testified that these were passengers that were transferred to Cal. Central.

The Witness: That is right, they were. [225]

The Court: How do you get "transferred" when it says "From"?

The Witness: I didn't see that written there, but I think I can explain it if you like.

The Court: What is your explanation?

The Witness: This document was examined in the office of North American Airlines, and it was at-

(Testimony of Joseph W. Stout, Jr.)

tached to the various accounting records concerning payment by North American Airlines to California Central for this particular flight. So I would assume, if you want an assumption——

The Court: I don't want you to assume. I want to find out what the facts are.

Did you write this "From Cal. Central" on here?

The Witness: No, sir, that is not mine.

The Court: That is not your writing?

The Witness: No, sir.

The Court: That was on there when you got it from the files of the company?

The Witness: Yes, sir.

The Court: I think the objection is good. The document speaks for itself and it says, "From Cal. Central," and I don't know why the witness should be allowed to testify that these passengers went to Cal. Central. The objection is good. The answer of the witness relative to passengers being transferred to Cal. Central is stricken from the record. [226]

I would suggest to the witness, if the witness is going to testify as to these documents, testify what the documents say, not what the witness thinks they say.

Q. (By Mr. Wright): With further reference, Mr. Stout, to Plaintiff's Exhibit No. 6, and that portion of it which includes a document called an Exchange Order, I believe, can you tell us in the space "From" the initials "BUR" and in the space "TO" the initials "SAN"—can you tell us what the BUR and the SAN stand for?

(Testimony of Joseph W. Stout, Jr.)

A. Those are air line codes. BUR stands for Burbank, and the SAN stands for San Diego.

Q. With further reference to the Exchange Order, and following the letters SAN in the next block appear the letters CCA—can you tell us what they stand for?

A. It is a code used for California Central Airlines.

Mr. Ackerson: If your Honor please, I will object to that as a conclusion. The record speaks for itself. There is no evidence here, your Honor, that we ever heard of this. I am not saying that we didn't, you understand, but this type of testimony is something that is awfully hard to object to as it is insidious.

The Court: They have documents here that use symbols. They don't mean a thing in the world to me. Somebody has got to explain them. That is why I said the other day that if I had to decide this matter upon the affidavits on file [227] I would have to decide against the Government, because I couldn't understand the affidavits, I mean I couldn't understand the exhibits.

Do you know of your own knowledge that those symbols represent California Central Airlines?

The Witness: That is industry knowledge, your Honor.

The Court: All right. The objection is overruled.

Mr. Wright: May this be marked for identification as Plaintiff's Exhibit No. 7?

(Testimony of Joseph W. Stout, Jr.)

The Court: It may be marked as Exhibit No. 7, California Central Airlines Exhibit.

The Clerk: No. 7 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 7, for identification, on case No. 16755-HW.)

Q. (By Mr. Wright): Mr. Stout, I show you Plaintiff's Exhibit marked No. 7 for identification, which purports to be a photostatic copy of a document, and ask you whether or not it was made by you? A. It was.

Q. Where?

A. In the office of North American Airlines at Lockheed Air Terminal.

Q. Is it a fair and accurate representation of the original? [228] A. It is.

Mr. Wright: I offer Plaintiff's Exhibit No. 7, for identification, in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 7.

(The document, marked Plaintiff's Exhibit 7, for identification, in case No. 16755-HW, was received in evidence.)

Q. (By Mr. Wright): Mr. Stout, I ask you if you can tell us what Exhibit 7 is?

A. Yes, it is a passenger manifest of North American Airlines flight from New York to Burbank, which departed New York September 30, 1953.

(Testimony of Joseph W. Stout, Jr.)

Q. Do some of the names which appear on Exhibit 7 also appear on Exhibit 6?

A. Yes.

Mr. Ackerson: There, again—I have no objection to him pointing them out as a matter of expedience.

The Court: This calls for a yes or no answer, and the objection is overruled. The answer is, yes.

The Witness: Yes.

The Court: Now you can identify the names.

Q. (By Mr. Wright): Can you identify the names?

A. O-r-t-h, there are two names, Mr. and Mrs. Orth, O-r-t-h. [229]

The Court: May I ask, what does DCA mean?

The Witness: Where is that, your Honor?

The Court: Here (indicating).

The Witness: DCA stands for Washington, D. C. It is the air line code.

The Court: So this on Exhibit 6. "From DCA" means Washington, D. C.?

The Witness: Yes.

The Court: "To SAN" means San Diego?

The Witness: Yes.

The Court: Now, on Exhibit 6 you have here a passenger manifest giving three names. Before you took the picture or photostat of this passenger manifest you placed on it two forms from North American Airlines, one Exchange Order—I don't know what the other form is. How do you know that the two forms that you placed on top of this mani-

(Testimony of Joseph W. Stout, Jr.)

fest before you took the picture applies to the manifest?

The Witness: Well, they were attached to the billing document supporting the payment by North American to California Central for the continuing transportation of these passengers.

The Court: You found these two slips in the files?

The Witness: Yes, sir.

The Court: Of what company?

The Witness: North American Airlines.

The Court: You found the passenger manifest in the [230] files of what company?

The Witness: North American Airlines.

The Court: Did you find in the files of North American any evidence that these three fares were paid by North American?

The Witness: Yes, sir.

The Court: All right, Mr. Wright.

Mr. Ackerson: If your Honor please, I can't see right now where these records, accounting records of North American, have had a sufficient foundation laid to show they have any bearing whatever on Cal. Central. They are hearsay.

The Court: I think the facts in this case are resolving the problem to a rather simple question, and that is if a passenger starts his travel from Washington or New York or Philadelphia, and goes down to a ticket agent and buys a ticket to San Diego and comes west on a carrier that is authorized to carry passengers across State lines, brings the

(Testimony of Joseph W. Stout, Jr.)

passengers to California, the passengers are disembarked and get on a plane that only operates in California, whether or not that passenger is in, as far as the California company is concerned, interstate travel.

Mr. Ackerson: I agree with that. I think that is one of the questions involved.

The Court: That is your problem, and that is the only problem we have here as far as I know. [231]

Assuming, although the evidence may not establish the facts, assuming that an agent in San Diego sells a ticket to New York or Chicago or Philadelphia, or Washington, on United, United starts a trip from Burbank, and assuming that the agent at the same time sells a ticket on Pacific Southwest or California Central lines, from San Diego to Burbank, assuming it is placed in the same envelope and delivered to the passenger, is that in itself enough to bring the local line, the local agency, within the Federal statute regulating air traffic?

It is a very simple question.

Mr. Ackerson: I agree with you.

The Court: I don't know what the answer is, I don't know what the courts have said. I suppose the courts have said something about this matter.

Mr. Ackerson: You will not find it in any of the briefs, your Honor, if they have.

The Court: That is the evidence so far, and all you are doing now is corroborating the testimony of other witnesses. I don't know whether there is going

(Testimony of Joseph W. Stout, Jr.)

to be any denial of the facts that have been presented to the court.

Mr. Wright. That is correct, your Honor, and while I disagree with Mr. Ackerson's statement about whether there is any law in the briefs, or not——

The Court: He didn't say any law; he said what the [232] courts have said, cases. It may be that this is a question of legislation and not a question for the courts, that if Congress wants to place these lines who only travel within the State boundary under Federal regulations, Congress can very easily do so. But it is not for the courts to legislate.

Mr. Wright: That is correct.

The Court: Courts can only interpret the laws already passed by Congress.

Mr. Wright: That is correct.

The Court: Now, whether or not lines that operate exclusively within a State, who pick up passengers after they have been disembarked by a national carrier, whether they come within the Act, I don't know.

I know you say they do. But that is your opinion. That is not conclusive.

Mr. Wright: Perhaps if we can agree on the facts we can just argue the law and end this preliminary hearing.

The Court: This has turned out to be more than a preliminary hearing, because I think you are making your case in chief, because when the time comes to hear the matter upon its merits, I assume that

(Testimony of Joseph W. Stout, Jr.)

you won't be able to produce much more testimony than you have at this hearing, except maybe to accumulate some more testimony.

Mr. Wright: That may be so. [233]

The Court: So if there is an objection, it is overruled.

Mr. Wright: I request that these three documents be marked for identification as Plaintiff's Exhibit 8.

The Clerk: No. 8 for identification.

The Court: 8 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8, for identification, in case No. 16755-HW.)

The Court: I might say, in furtherance of my remarks a moment ago, there is nothing in the case so far to indicate that either one of the defendants have done anything except to pick up and transport passengers that may be making a trip outside the State of California. That is the only offense they have been guilty of, I assume.

Mr. Wright: That is the issue.

Q. (By Mr. Wright): Mr. Stout, I show you Plaintiff's Exhibit marked No. 8 for identification, which purports to be three sheets of photostatic copies of documents, and ask you whether or not those photostats were made by you?

A. They were.

Q. And where were they made?

(Testimony of Joseph W. Stout, Jr.)

A. In the office of North American Airlines at Lockheed Air Terminal.

Q. Are they fair and accurate representations of the [234] original? A. Yes, sir.

Mr. Wright: I offer Exhibit 8 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 8.

(The document, marked Plaintiff's Exhibit 8, for identification, in case No. 16755-HW, was received in evidence.)

Q. (By Mr. Wright): Now, Mr. Stout, while I have had these exhibits 6, 7 and 8, marked 6, 7 and 8 separately, are you able to state whether or not they constituted one complete set of documents as you found them in the files of North American?

A. Yes, sir.

Q. Exhibit 8, particularly the first sheet thereof, is what?

A. It is a passenger manifest of a North American flight operating from Washington, D. C., to Burbank on September 30, 1953.

Q. Is that a part of the same manifest of which Exhibit 7 is one sheet? A. Yes.

Q. Now, will you tell us what the usual method is in making up a manifest as to how many sheets, rather than just [235] listing the passengers as they come in or alphabetically on one sheet, what is the usual way——

Mr. Ackerson: Just a moment. I take it this

(Testimony of Joseph W. Stout, Jr.)

question, Mr. Wright, relates to general methods?

Mr. Wright: That's right.

The Witness: The required procedure calls for the preparation of a manifest at each station, including the originating, plus the intermediate station where passengers are enplaned or deplaned during the course of a flight progressing from the origin to the destination of the flight, terminal of the flight.

Q. (By Mr. Wright): In other words——

The Court: Just a minute. Assume that you start at Washington and you fix up a manifest, and you go over to Chicago and you lose two passengers, do you fix up a new manifest for the remaining eight?

The Witness: The manifest made would show the through passengers, which would be adjusted to account for the two who had deplaned at Chicago, plus the listing of all passengers boarded at Chicago for that flight.

The Court: Well, do you use your original sheet, your original manifest, or do you have to recopy the eight that are still going on?

The Witness: No, you don't relist the passengers that originated east of Chicago; you show those passengers as [236] through passengers, and then you list only the passengers who board at Chicago.

The Court: That is, you make a new manifest?

The Witness: Yes, sir.

The Court: For the Chicago passengers?

The Witness: Yes, sir.

Q. (By Mr. Wright): Referring to Exhibit 7, which you have already identified as a manifest,

(Testimony of Joseph W. Stout, Jr.)

that shows passengers between what point of origin and what destination?

A. Originating at New York, destined to Burbank.

Q. With reference to Exhibit 6, that manifest lists passengers between what points?

A. This is a transfer manifest.

Q. I beg your pardon. Withdraw the question.

With reference, again, to the first page of Exhibit 8, that lists passengers originating where and destined to what point?

A. In Washington, D. C., destined to various points west of Washington.

Q. With reference to the second page, does that indicate the origination and destination of the passengers listed on the second page of Exhibit 8?

A. Yes, that shows the passengers boarded at Chicago for points west of Chicago.

Q. Do any of the passengers that appear on 7 and 8 also [237] appear on Exhibit 6?

A. No.

Mr. Wright: I request that these two documents be marked for identification as Exhibit 9.

The Court: They may be marked as Plaintiff's Exhibit 9.

The Clerk: 9 for identification.

(The document referred to was marked Plaintiff's Exhibit 9, for identification, in case No. 16755-HW.)

Q. (By Mr. Wright): I show you Plaintiff's Exhibit marked for identification No. 9, which pur-

(Testimony of Joseph W. Stout, Jr.)

ports to be two pages of photostats, and ask you whether or not those photostats were made by you?

A. They were.

Q. Where were they made?

A. They were made in the office of North American Airlines.

Q. Are they fair and accurate representations of the originals? A. They are.

Mr. Wright: I offer Exhibit 9, for identification, in evidence.

The Court: It may be received in evidence.

(The document marked Plaintiff's Exhibit 9, for identification, in case No. 16755-HW, was received in evidence.) [238]

Q. (By Mr. Wright): Now, with reference to Exhibit 9, Mr. Stout, will you state what Exhibit 9 is?

A. The first sheet of Exhibit 9 is the passenger manifests from North American's flight 201, which was prepared—which shows the passengers boarded at Kansas City for points west of Kansas City.

Q. Page 2?

A. Page 2 is a transfer manifest from this flight showing the passengers who were transferred at Burbank for continuing transportation to San Diego.

Q. Now, can you from an examination of Exhibits 6, 7, 8 and 9 state whether the manifests that are in those exhibits pertain to the same flight?

A. Well, 7 pertains to flight 600, and 8 also

(Testimony of Joseph W. Stout, Jr.)

pertains to flight 600, and Exhibit 9 pertains to flight 201.

Q. Two separate flights?

A. That's right, two flights that terminated at Burbank on October 1st.

Q. I didn't catch the last part of your answer. You say two flights that terminated the same day?

A. These documents include passenger manifests of two North American flights which terminated at Burbank on October 1st, 1953; and they also include the transfer manifest from these flights to the continuing carrier at Burbank.

Q. Is Exhibit 6 one of the transfer [239] manifests? A. That's right.

Q. And which exhibit contains the other transfer manifest?

A. Exhibit 9, the second sheet.

Q. Do the transfer manifests indicate whether or not these passengers from these two flights were transferred to a single flight for onward transportation?

A. They both show that the passengers were transferred to a flight of California Central to San Diego.

Mr. Ackerson: Just a moment. Your Honor, I move that be stricken: I don't see where that shows at all. It is a conclusion.

The Court: Will you show me that?

The Witness: Yes, sir.

The Court: Speak up loud so they can hear you.

The Witness: In this document here, Exhibit 9,

(Testimony of Joseph W. Stout, Jr.)

the second sheet, the letters CCA are shown on the transfer manifest, which I previously mentioned as being the code for California Central Airlines. And on this Exhibit 6 this sheet shows here Burbank to San Diego, CCA, California Central Airlines, California.

Mr. Ackerson: And there is a place marked there by North American ?

The Witness: Yes.

Mr. Ackerson: All right. [240]

The Court: The same names on the manifests ?

The Witness: No, sir. This includes passengers transferred from flight 201, and then these are three passengers who came from North American flight 600.

The Court: What is the passenger's name ?

The Witness: Well, on this one it is Robbins and Mr. and Mrs. Orth, and the other one is Winins and Lane. There are several other names there.

The Court: Objection overruled.

Mr. Ackerson: I will try to expedite this and cease making that type of objection.

Mr. Wright: I request that this exhibit consisting of seven pages be marked as Plaintiff's Exhibit No. 10 for identification.

The Court: It may be marked Plaintiff's Exhibit 10 for identification.

The Clerk: 10.

(The document referred to was marked Plaintiff's Exhibit No. 10, for identification, in case No. 16755-HW.)

(Testimony of Joseph W. Stout, Jr.)

Q. (By Mr. Wright): Mr. Stout, I show you Plaintiff's Exhibit No. 10 for identification, which purports to be seven sheets of photostatic copies of documents and ask you whether or not the photostats were made by you?

A. Yes, sir, they were. [241]

Q. And where were they made?

A. In the office of North American Airlines at Lockheed Air Terminal.

Q. And are they fair and accurate representations of the originals? A. They are.

Mr. Wright: I offer Plaintiff's Exhibit marked No. 10 for identification in evidence.

The Court: It may be received in evidence.

(The document marked Plaintiff's Exhibit 10, for identification, in case No. 16755-HW, was received in evidence.)

Q. (By Mr. Wright): Now, Mr. Stout, with reference to Exhibit 10, and particularly the first page thereof, will you tell us what that document is?

A. The first page is the passenger manifests of the North American Airlines flight 600 originating in New York, September 9, 1953, listing the passengers going from New York to Burbank, plus two passengers going from New York to San Diego.

Q. Can you tell us what page 2 of Exhibit 10 is?

A. Page 2 is a passenger manifest of this same flight listing the passengers who boarded at Dallas

(Testimony of Joseph W. Stout, Jr.)

for transportation to Burbank and San Diego.

Q. With reference to these two pages, is there a code or [242] symbol used to indicate the destination of the passengers?

A. Yes; in the destination column, the "SAN" is a code for San Diego, on both sheets.

Q. Will you tell us what page 3 of Exhibit 10 is?

A. Page 3 is a passenger manifest of North American flight 201 listing passengers transported on this flight from New York to Burbank and San Diego.

Q. Page 4 of Exhibit 10 is what?

A. Page 4 is the manifest, passenger manifest of this same flight 201 listing passengers boarding at Chicago for Oakland and San Diego.

Q. Now, will you tell us what page 5 is?

A. Page 5 is the transfer manifest of passengers from flight 600, previously mentioned, who were transferred at Burbank to another carrier for transportation—continuing transportation to San Diego.

Q. What are the other documents that appear on page 5?

A. They are the passenger coupons of the three passengers—passenger coupons of the tickets of the three passengers who traveled from points east of Burbank to Burbank on North American Airline flight 600 and were transferred at Burbank for continuing transportation to San Diego.

Q. Do those coupons show by air line symbols the origination and destination of the passengers?

(Testimony of Joseph W. Stout, Jr.)

A. They do. [243]

Q. Now, I ask you what the documents that appear on page 6 of Exhibit 10 consist of?

A. This document lists the names of the passengers who were transferred from North American to California Central for continuing transportation to San Diego.

Q. What are the other documents that appear on page 6?

A. Those are the tickets covering the transportation of these passengers from points east of Burbank through to the final destination of San Diego.

Q. What is page 7?

A. 7 is a copy of a request for check supporting the payment of the continuing transportation of the seven passengers to California Central.

Q. Does Exhibit 10, consisting of seven pages, constitute the complete set of documents which you examined in the office of North American in connection with this particular flight? A. Yes.

Q. Did you make photostatic copies of all of the manifests and tickets that you examined in the office of North American? A. No, sir.

Q. Approximately how many photostats did you make of records similar to Exhibit 10? [244]

A. Approximately 50.

Q. In addition to Exhibit 10 there are further sets of similar documents, are there not, made by you in the office of North American, which are exhibits to your affidavit filed in this proceeding?

A. That is correct.

(Testimony of Joseph W. Stout, Jr.)

Q. During the course of your investigation did you have occasion to observe the arrival and departure of any of the flights of North American or California Central? A. I did.

Q. Do you recall whether or not you observed flights of North American on October 1, 1953, at Lockheed Air Terminal?

A. Yes, sir, I observed the arrival of North American's flight 201 and flight 600 on that date.

Q. Will you tell us what you observed?

A. Well, these two flights arrived at Burbank at approximately 10:00 a.m., and the passengers destined to San Diego checked in at the North American Airlines ticket counter upon arrival, and as each passenger checked in the agent on duty at the North American counter, Mr. Wootton, examined the tickets held by these passengers, and for the passengers holding one-way tickets he validated the passenger coupon and instructed the passenger to check at California Central for his flight to San Diego. The passengers who held round-trip tickets, which included a return ticket from [245] San Diego to their destination east of Burbank, were issued Exchange Orders by North American and were instructed to present the Exchange Orders to California Central for the continuing flight to San Diego. And I then observed these passengers check into California Central and the passengers with the North American Exchange Order presented that document to the California Central agent who picked it up and gave them a gate pass, and advised

(Testimony of Joseph W. Stout, Jr.)

them that they would be flying on California Central flight 534 to San Diego.

The passengers who held a passenger receipt of the one-way ticket, surrendered their passenger receipt copy to the California Central agent, and he returned the ticket folder to the passenger with a gate pass for transportation on to San Diego. And I also observed that the baggage was physically transferred from the aircraft of North American over to the aircraft of California Central, and I was also advised——

Q. Just a moment. What do you mean by physically transferred?

A. It was what they call a field transfer. The baggage was not taken into the passenger terminal and claimed by the passenger and rechecked again; the baggage was simply checked through to San Diego from the passenger's origin in the East, and it was transferred from the North American aircraft on over to the California Central plane [246] without having to go through the passenger terminal. I interviewed one of the passengers who had arrived on North American and was continuing on to San Diego. His name was Private Robbins——

Mr. Ackerson: Your Honor, I am going to object to this conversation as hearsay.

The Court: He hasn't given any conversation.

Mr. Ackerson: I will save it, then. Excuse me. I have read his affidavit, your Honor.

The Court: I didn't hear any conversation. He just said he interviewed him.

(Testimony of Joseph W. Stout, Jr.)

Mr. Ackerson: I am sorry.

The Witness: And I asked to examine the tickets of Private Robbins. And the only ticket that he had was a ticket folder of North American Airlines showing his origin at Washington and his destination as San Diego. And the only baggage check held by this passenger was a North American check showing that the bag had been tagged from Washington through to San Diego, and this passenger still held the North American check to claim his baggage upon arrival in San Diego. And he also had a California Central gate pass.

Q. (By Mr. Wright): I believe, if I recall correctly, you said that you observed these passengers checking in with the ticket agent at California Central's counter. Did you observe whether or not they boarded any aircraft thereafter? [247]

A. Yes, shortly afterwards the California Central flight 534 to San Diego was announced, and these passengers, including the Private Robbins that I interviewed, boarded the California Central flight for their continuing transportation to San Diego. It departed about 11:00 a.m.

Q. Did you observe any other similar flights while you were there, during the course of your investigation, not necessarily the same day?

A. Not that I recall.

Q. Have you ever ridden on one of California Central's aircraft? A. I have.

Q. On one or more than one occasion?

(Testimony of Joseph W. Stout, Jr.)

A. It was a round trip from Burbank to San Francisco and return, the same day.

Q. When was that? A. May, 1949.

Q. What was your purpose, if any? Was this in the course of your official duties?

A. It was.

Mr. Ackerson: I might object to the question as a legal conclusion, your Honor.

The Court: What is your purpose is certainly a conclusion.

I notice it is nearly 3:00 o'clock. I think we [248] will take our afternoon recess. We will now recess until 3:00 o'clock.

(Whereupon a recess was taken.)

Q. (By Mr. Wright): Was there a particular reason why you made that trip on California Central? A. Yes.

Q. What was that reason?

A. I was making a survey to determine what amount of traffic California Central was carrying where passengers originated or terminated their trip outside the State of California.

Q. Where did you buy your ticket?

A. Well, I received my ticket at the Lockheed Air Terminal.

Q. At the ticket counter there?

A. Yes.

Q. Whose ticket counter was it?

A. California Central.

(Testimony of Joseph W. Stout, Jr.)

Q. Will you tell us what happened. Describe the circumstances of your purchase of the ticket?

A. Well, the arrangements had been made for me to make this trip, and when I reported to the California Central ticket counter, the California Central employee asked me my address, and I stated it was Washington, D. C., and he said that he couldn't use an out-of-state address, and I [249] said, "Well, I have a local address, I can give the hotel where I have been staying. I have been there several days." And he said that would be all right. So I gave him the Clark Hotel in Los Angeles.

Q. Did you observe at that time other passengers being ticketed? A. I did.

Q. Tell us what you observed with relation to them?

A. Well, at that time California Central had a screening process to restrict out-of-state traffic. The ticket contained information on the reverse side where the passenger certified that his trip had neither originated nor would be terminated at a point outside the State of California. And I signed a similar certification myself.

Q. You signed such a statement?

A. Yes.

The Court: Do you know whether or not that is the present custom?

The Witness: Not according to my observation October 1st. There were no such certifications.

The Court: You say they required you to sign that, and you say you signed it?

(Testimony of Joseph W. Stout, Jr.)

The Witness: Yes. But that was in May of '49.

The Court: Then between '49 and '54 the policy changed?

The Witness: Apparently so, or else the policy is not [250] being effected. I don't know what the present policy is, your Honor.

Q. (By Mr. Wright): Did you say you observed other passengers being ticketed at the time in 1949 of your flight on Cal. Central?

A. Yes.

Q. Did you observe whether or not they signed similar documents to the one you signed?

A. Yes, sir.

Q. Did you arrive in Los Angeles this week?

A. Yes, sir.

Q. On what day?

A. I arrived here Tuesday, that is, the 20th.

Q. By what means did you travel?

A. Through American Airlines Flight 7 from Washington, D. C., to Los Angeles, and arrived at Los Angeles International Airport at 5:40 p.m., July 20th.

Q. Did you have occasion at your arrival to visit the ticket counter of California Central?

A. I did.

Q. And will you tell us what you did?

A. I walked over to the California Central ticket counter to inquire about a flight to San Francisco, and talked to the agent, California Central agent, Mr. Morrison, and told him that I had just arrived from Washington on American's [251] flight

(Testimony of Joseph W. Stout, Jr.)

and might want to go on to San Francisco that night. And he said he had a flight leaving at 7:25 p.m. I asked him to hold seats for Mr. John Chambers and myself, and I would let him know in 15 minutes whether those seats would be used. And he did confirm the space, and I checked back 15 minutes later saying that I would be unable to use the space and to cancel the two seats for Chambers and myself on this 7:25 p.m. departure to San Francisco.

Mr. Wright: I think that is all.

Mr. Ackerson: I only have a couple of questions, your Honor.

Cross-Examination

By Mr. Ackerson:

Q. Mr. Stout, you stated that on this recent trip you observed what they call a field transfer of baggage, I believe, from North American flight, either 901 or 600 to 201 or 600, one of them, directly to a California Central plane? A. That's right.

Q. And you also spoke of flight—the other flight.

A. Yes, sir.

Q. Where the passengers went into their own ticket office and then came over and were cleared through Cal. Central? A. Yes, sir. [252]

Q. Was the field transfer from a plane that was late?

A. These two planes were slightly late. I believe

(Testimony of Joseph W. Stout, Jr.)

the scheduled arrival time was about 9:00 a.m., and he got in about 10:00 a.m.

Q. And which got in the earliest?

A. I couldn't say. They both seemed to arrive about the same time.

Q. In any event the passengers on one plane went in and cleared the regular way, and then you saw a field transfer with respect to the other plane, is that it?

A. No; the baggage—all together there were eight transfer passengers from the two North American flights to California Central, three passengers came from flight 600 and five passengers came from flight 201, and they were all going to California Central's flight 534.

Q. And which flight had the field transfer—the three passengers?

A. I just saw them unloading the baggage and Mr. Wootton told me they were making a field transfer of the baggage over to the California Central aircraft.

Q. Irrespective of what Mr. Wootton told you, Mr. Stout, did you observe that the California Central plane took off almost immediately after the field transfer?

A. I want to correct it if I have made any misrepresentation or it is not clear. I didn't see the complete [253] physical handling of the baggage from the two North planes to the California Central aircraft. I saw them unloading the baggage and Mr. Wootton told me that a field transfer was being

(Testimony of Joseph W. Stout, Jr.)

made, and I also interviewed the one passenger, and he showed me his baggage check, which was a North American tag, which showed that the baggage had not been reclaimed or rechecked at Burbank.

Q. Did Mr. Wootton also tell you that North American, the two North American planes were late, or do you know the schedule and do you know of your own knowledge?

A. Yes, I knew they were a little late.

Q. Did you know what California Central's schedule was for that flight, I mean the time to depart?

A. I didn't know for sure. It departed about 11:00 a.m.

Q. All right. I have only one more question. You spoke of this passenger Robbins.

A. Yes.

Q. That was the man that you were discussing that you said you talked with Robbins, did you?

A. Yes.

Q. Did I understand you correctly to say that no ticket was issued to Robbins by Cal. Central?

A. That is correct, yes, sir.

Q. Didn't you find, as a matter of personal knowledge, [254] either then or later, that California Central had, in fact, issued Robbins a regular California Central ticket?

A. Not to Robbins. California Central made up a ticket for their own records, but that was never seen or given to passenger Robbins or any of the other passengers who made this transfer.

(Testimony of Joseph W. Stout, Jr.)

Q. But you saw Robbins' ticket made out to Robbins, didn't you?

A. I saw a ticket that California Central had made for their own records—

The Court: Just a minute. How do you know that? You are giving some conclusions here. How do you know?

The Witness: I watched him check in, your Honor, and there never was a ticket given to him or any mention made of any California Central ticket.

The Court: Can you testify that there never was at any time out of your presence a ticket given to him?

The Witness: I watched him check in at the counter, and I followed him out to the ramp before he loaded the plane, and I looked at his tickets.

The Court: At no time no ticket had been given to him?

The Witness: That's right.

The Court: But you don't know what happened afterwards?

The Witness: Whether they mailed one to him or not?

The Court: No. While he was on the [255] plane.

The Witness: No, I don't. But I saw the passenger's receipt of that ticket after the plane departed, so I know he never received that passenger receipt at Burbank. It would have had to be mailed to him if he ever got it.

Q. (By Mr. Ackerson): Do you know that the

(Testimony of Joseph W. Stout, Jr.)

practice of California Central usually is to pick up the ticket at the counter from all passengers, practically?

A. Are you speaking of transfer passengers?

The Court: He said all passengers.

Mr. Ackerson: From all passengers, did you know that that was their policy?

The Witness: They picked up the North American—

The Court: No, no, no. Just answer the question. Do you know if that is their policy?

The Witness: No, I don't know if it is.

Q. (By Mr. Ackerson): You don't know that they pick up the tickets from all passengers and merely give them a gate pass to get on the plane?

A. I don't know the policy.

Q. But you did see a ticket made out to Robbins, the man you are talking about? A. Yes.

Q. At the full price? A. Yes, sir.

Q. Including tax? [256] A. Yes, sir.

Mr. Ackerson: That's all.

Mr. Wright: I have no further questions as far as—

The Court: May this witness be excused?

Mr. Ackerson: He may.

Mr. Wright: I beg your pardon, your Honor. As far as California Central is concerned.

The Court: I am sorry.

Mr. Wright: I do have a couple of questions with reference to two exhibits.

(Testimony of Joseph W. Stout, Jr.)

The Court: I should have waited until after you finished your statement.

Redirect Examination

By Mr. Wright:

Q. Mr. Stout, I show you Plaintiff's Exhibits, in case 16754-HW, marked for identification 23 and 24, which purport to be photostatic copies of documents, and ask you whether or not those photostats were made by you? A. They were.

Q. Where were they made?

A. In the office of U. S. Aircoach at Lockheed Air Terminal.

Q. Can you remember about when they were made? A. October 1st, 1953. [257]

Q. Are they fair and accurate representations of the original documents? A. They are.

Mr. Wright: I offer Exhibits 23 and 24, for identification, in evidence.

The Court: They may be received in evidence.

The Clerk: Exhibits 23 and 24.

(The documents referred to were marked Plaintiff's Exhibits 23 and 24, and were received in evidence.)

Mr. Gardiner: If your Honor please, I don't understand the relevancy——

The Court: They may not be relevant. If they are not relevant we will ignore them.

Mr. Gardiner: This is not executed by Pacific Southwest or——

(Testimony of Joseph W. Stout, Jr.)

The Court: He said he found them in the files of the company.

Q. (By Mr. Wright): Mr. Stout, I refer you to Exhibit 24 and ask you to examine it, and after having examined it if you can will you tell us what the documents consist of?

A. Exhibit 24 consists of three documents which are the passenger manifests of a U. S. Aircoach flight from New York to Burbank, departing from East Coast points on September 17, 1953; and also included on these forms are the copies of several tickets used on this flight. [258]

Q. Were these documents which you have just described found by you or furnished you by U. S. Aircoach in their offices?

A. They were.

Q. And do they relate to the same flight?

A. They do.

Q. With reference to page 3 of Exhibit 24 in the lower portion thereof there appears an Exchange Order; was that included in the group of documents which you examined?

A. Yes.

I would like to correct my other testimony to show that page 3 is a transfer manifest of the U. S. Aircoach flight listing the passengers who were transferred at Burbank for continuing transportation to San Diego.

Mr. Wright: I have no further questions.

The Court: May this witness be excused?

Mr. Gardiner: I would like to ask one or two questions with respect to Plaintiff's Exhibit 24 in the Pacific Southwest case

(Testimony of Joseph W. Stout, Jr.)

Does the witness still have that exhibit before him?

The Witness: Yes, sir.

Cross-Examination

By Mr. Gardiner:

Q. On page 1 of Exhibit 24 there are two documents, [259] flight coupons B-19524 and 19523. From your familiarity with the abbreviations and symbols, could you tell me what the initials SC PHL and then a number on the left-hand side indicate?

A. I see. It is Skycoach, Philadelphia.

Q. Right over that phrase I note there is imprinted "Issued in exchange for."

A. Yes, sir.

Q. Would that indicate that this flight coupon depicted on page 1, Exhibit 24, was issued by the carrier in exchange for some document that Skycoach of Philadelphia had issued?

A. Yes, Skycoach of Philadelphia had initially issued an Exchange Order before the passenger began his flight.

Q. Could you tell me how you determine that Skycoach had issued an Exchange Order in exchange for some other document?

A. Because it says, "Issued in exchange for" and then it says, "SC PHL," Skycoach, Philadelphia.

(Testimony of Joseph W. Stout, Jr.)

Q. I repeat my question, how do you determine from that number that it was an exchange order issued by Skycoach, as distinguished from maybe an interline ticket, or——

A. I refer to it as an exchange order because it wasn't a document that was issued for the final transportation. There was another ticket, flight ticket, issued against this [260] initial form that was sold by Skycoach of Philadelphia.

Q. Then, in other words, the passenger who went to Skycoach in Philadelphia received something, an Exchange Order or similar document, which was not suitable for transportation, and exchanged it in return for this flight coupon?

A. I can't testify as to what happened there, but there was, according to this ticket here, an Exchange Order of some preliminary form issued—I call it an Exchange Order—by Skycoach, and there was a U. S. Aircoach ticket reissued against that Exchange Order sold by Skycoach, which provided for the transportation of the passenger from Philadelphia to San Diego.

Q. The document depicted, then, flight coupon, provided for the transportation, and it was issued in exchange for something which Skycoach in Philadelphia had originally issued to the passenger?

A. That's right, according to this document here.

Mr. Gardiner: That is all, your Honor.

Mr. Wright: I have no further questions.

The Court: May this witness be excused?

(Testimony of Joseph W. Stout, Jr.)

Mr. Gardiner: We have no further use of him.

The Court: You may be excused.

Mr. Wright: Call Mr. Jack Wootton. [261]

JACK F. WOOTTON

called as a witness by and on behalf of the plaintiff,
having been first duly sworn, was examined and
testified as follows:

The Clerk: State your name.

The Witness: Jack F. Wootton.

The Clerk: Spell your last name.

The Witness: W-o-o-t-t-o-n.

Direct Examination

By Mr. Wright:

Q. Mr. Wootton, will you state where you are presently employed?

A. North American Airlines, Lockheed Air Terminal in Burbank.

The Court: Will you keep your voice up a little bit? I am satisfied counsel can't hear you.

The Witness: North American Airlines at Lockheed Air Terminal in Burbank.

Q. (By Mr. Wright): In what capacity?

A. Air line ticket agent.

Q. For how long have you been so employed?

A. Since October of 1952.

Q. Are there other personnel that are also employed at the same counter? [262]

(Testimony of Jack F. Wootton.)

A. Yes, sir.

Q. What are the hours of your employment?

A. They vary with the weeks. I work different shifts.

Q. There is more than one shift on the counter?

A. Yes, sir.

Q. And you generally work with one or more other ticket agents on the same shift?

A. It varies with the shift that I am working. On the day shift I work alone; on the night shift with other agents.

Q. Can you tell us generally speaking the hours of the day shift, and the hours of the night shift?

A. At the present time on the day shift I work from 6:00 a.m., till 2:00 p.m. On the night shift from 2:00 until 10:00.

Q. How many flights are handled, either arrivals or departures, by you and whoever else happens to be working on the counter, on the day shift?

A. It varies with the time of the year, equipment available, anywhere from one to three or four.

Q. Are those all arrivals?

A. Not necessarily.

Q. The North American flights that operate east and westbound—I will withdraw that. Isn't it true that the westbound North American flights generally arrive on the day [263] shift?

A. Generally.

Q. And the eastbound flights depart during the night shift?

A. That's right.

Q. Now, will you tell us just what your duties

(Testimony of Jack F. Wootton.)

are in connection with the arrival of the west-bound transcontinental flights?

A. I meet the arriving airplane at the ramp, give the information to the hostess as to what I want the passengers to do, to come to the counter to recheck, and reconfirm their reservations for on space to other places in California, or give them the information directly on the airplane as to what gate and what flight number they will continue on.

Q. And then sometime before the arrival of the flights you receive a notification as to passengers, if any, that require onward transportation to some other point than Burbank?

A. Yes, sir.

Q. How do you receive that notification?

A. By teletype from the last passenger spot.

Q. And that would generally be what—either Kansas City or Chicago?

A. At the present time Chicago or Dallas.

Q. When you receive that notification by teletype, for [264] instance, that a certain number of passengers require onward transportation to San Diego, what do you do?

A. I call our operations manager and advise him the number of aircraft coming in, the number of passengers requiring on space; he, in turn, advises me what aircraft will carry them, that is, our own aircraft; if we don't have equipment available, to secure space on other carriers.

Q. When you don't have your own equipment available, do you secure or attempt to secure space on other carriers for the passengers?

(Testimony of Jack F. Wootton.)

A. Yes, sir.

Q. What carriers do you attempt to secure space on? A. The first available.

Q. Does that include United and Western?

A. Yes, sir.

Q. Also California Central? A. Yes, sir.

Q. Pacific Southwest? A. Yes, sir.

Q. If you succeed in confirming the onward transportation on a carrier, how is the payment of the fare on that other carrier arranged for or taken care of?

A. That is an accounting problem. I couldn't tell you.

Q. You do secure space on flights from Burbank to San Diego for these passengers? [265]

A. On occasion, yes.

Q. And occasionally if the equipment isn't available, from Burbank to San Francisco or Oakland?

A. Yes, sir.

Q. When you do secure that space occasionally, you do not see to the payment of the fares?

A. No, sir.

Q. Do you furnish the carrier who confirms the space to you with some documentation or some means whereby the carrier can get paid?

A. It varies with the condition. I can give them a list of names of the passengers which, in turn, could be furnished for billing, or I can issue the passenger himself a flight coupon, a flight ticket.

Q. Do you have at your counter the tickets of Pacific Southwest? A. Yes, sir.

(Testimony of Jack F. Wootton.)

Q. And have you always had those available at your counter?

A. Unless we accidentally run out.

Q. Do you have the tickets of California Central?

A. Yes, sir.

Q. So that you—if you had secured onward transportation from either one of those carriers you could either furnish them just a list of names or issue to your incoming passenger [266] one of their tickets?

A. That's right.

Q. Are these California Central and Pacific Southwest Airways tickets charged to you personally?

A. No.

Q. You are not accountable for them personally?

A. Well, I shouldn't say no. I sign for the receipt of them. If I happen to be working the shift at the time that they are delivered to the counter.

Q. Do you also on occasion issue Exchange Orders?

A. Which ones—North American Exchange Orders?

Q. Yes.

A. Yes, I do.

Q. I show you Plaintiff's Exhibit No. 6 in 16755-HW, and ask you whether or not the document on which is printed Exchange Order is the form which you sometimes utilize?

A. Yes, it is.

Q. Does this particular one happen to be one that was issued by you?

A. Yes, sir, it is.

Q. And your signature appears thereon?

A. On the bottom.

(Testimony of Jack F. Wootton.)

Q. Did you also make the other entries that appear on that Exchange Order?

A. Everything that isn't printed on the Exchange Order [267] is written in by the agent.

Q. I ask you whether or not you also prepared the passenger manifest, which is part of the same Exhibit No. 6?

A. I couldn't be certain, but it looks like my writing.

Q. The name of the persons to whom you issued the Exchange Orders also appear on the manifest, isn't that correct?

A. Yes, it does.

Q. When you issue these passengers Pacific Southwest or California Central tickets for their onward transportation, do you have to account for those tickets on a sales report of some kind?

A. Yes, I do.

Q. Is that a daily sales report?

A. That is a separate report from the daily sales report. It is a special form made up for passengers who travel on other carriers.

Q. Are those tickets issued directly to the passengers or—when you do issue these tickets are they issued directly to the passengers, or do you turn the tickets over to either California Central or Pacific Southwest ticket counter at Lockheed Air Terminal?

A. In most cases they would be issued directly to the passengers.

Q. Do you collect an additional fare from the passenger? [268]

A. No, I don't.

(Testimony of Jack F. Wootton.)

Q. The cost of that, as far as you know, then, is paid—well, it is paid by someone other than the passenger?

Mr. Ackerson: If the witness knows, your Honor. I object to it as calling for a conclusion.

Mr. Wright: If he knows.

The Court: Do you know who it is paid by?

The Witness: No, I don't.

Q. (By Mr. Wright): What entries do you make on your report when you issue tickets in this manner, and do not collect the fares?

A. I list the ticket number, the name of the passenger, and their destination.

Q. Are you familiar with the request for check form which appears as page 7 of Exhibit 10?

A. No, I am afraid I am not.

Q. Will you read this particular one?

Mr. Gardiner: Might I inquire which case that exhibit is in, your Honor?

Mr. Wright: Exhibit 10. I believe it is California Central.

Q. (By Mr. Wright): That refers, apparently, to fares to cover the transportation of persons from Burbank to San Diego, does it not?

A. It would indicate that. [269]

Mr. Ackerson: Did the witness state that he knew what it was, he was familiar with the document?

The Witness: I have never seen what it is.

The Court: He says he wasn't familiar with it.

(Testimony of Jack F. Wootton.)

You are asking him to interpret something that he doesn't know anything about.

Mr. Ackerson: I would move that the last answer be stricken, your Honor.

The Court: It may go out.

Q. (By Mr. Wright): On occasions when you secure space for onward traveling passengers on California Central or Pacific Southwest, are you ever presented at that time by an invoice or a billing of any kind from either one of those carriers, at the time of the arrangement for the onward transportation?

A. This is for passengers who have arrived on my flight?

Q. Who have arrived or are arriving.

A. No, I never have.

Q. So, as you have already stated, you are not familiar with the accounting or the bookkeeping?

A. No, sir.

Q. But on these reports that you make out you account for all the tickets that have been issued by you?

A. Yes, sir. [270]

Q. And that goes to the accounting office?

A. Yes, sir.

Mr. Wright: I have no further questions.

(Testimony of Jack F. Wootton.)

Cross-Examination

By Mr. Gardiner:

Q. Mr. Wootton, will you give the full name of your employer? A. North American Airlines.

Q. Could you tell the type of business? Is that a ticket agency? A. I couldn't say.

Q. You are not familiar with the corporate organization? A. No, sir.

Q. You mentioned the shift hours, and they seem to indicate that from 10:00 p.m. to 6 a.m., the office is closed, is that correct?

A. Yes, sir.

Q. When do you receive this teletype message to which you referred from an eastern city? I think you said Dallas or Chicago, indicating the number of passengers on one of the flights that is due to arrive that morning?

A. It varies with the flight itself, the operating time. The Chicago flight, we receive the dispatch approximately [271] 9:00 p.m. every evening; the Dallas dispatch comes in unattended during the early morning.

Q. That is a dispatch for which flight, the one arriving in the evening or morning?

A. They both arrive in the morning. They leave Chicago approximately 9:00 o'clock, 9:00 p.m., our time.

Q. And when do you get the dispatch?

A. Immediately after they leave.

(Testimony of Jack F. Wootton.)

Q. When those passengers come in, and some of them wish to continue to other cities, you transport them on your own equipment, I believe you stated?

A. Yes, sir.

Q. And do you have your own equipment or the equipment of carriers whose tickets you sell going to Oakland? Do you?

A. Would you repeat that?

Q. Do the carriers whose tickets you sell in this State operate shuttle flights or any type of flights from Burbank to Oakland?

A. Yes, they do.

Q. And do they operate flights from Burbank to San Diego?

A. Yes, sir.

Q. And approximately how many flights a day do you operate in that manner to Oakland?

A. Ordinarily one to Oakland. [272]

Q. And what equipment is that?

A. It varies with the passenger load. Anything from a DC-3 to a DC-4.

Q. What is the passenger capacity of a DC-4 that is used for that type of work?

A. 80 passengers.

Q. What type of equipment is used for the southbound on the shuttle service?

A. Ordinarily a DC-3.

Q. And that is what—28 seats?

A. 28 seats; yes, sir.

Q. Do those planes carry passengers when they return north?

A. Yes, they do.

Q. And consequently from the south?

A. Yes.

(Testimony of Jack F. Wootton.)

Q. And when you have too many passengers, an excess load for the northbound plane—withdraw that.

You testified that when you do not have equipment available, when you have more passengers than you have equipment for, you contact other carriers. How often does that situation occur, how often do you have to contact other carriers to take passengers to San Diego or Oakland?

A. At the present time, it is very seldom.

Q. Upon those flights, do you also, upon occasion, [273] transport from Burbank to either San Diego or Oakland, passengers from other large irregular carriers who may have been off-loaded at Burbank?

A. Yes, sir, we do.

Q. And upon occasion when you do not have equipment, are you able to divert your own incoming passengers from the East Coast cities to any such flights of other large irregular carriers in this State?

A. Yes, sir.

Q. What carrier does your line use for the southbound transportation of passengers who may eventually, or who may go out of the State on one of your eastbound flights?

A. From what point?

Q. Well, what points do you offer service from in northern California?

A. From Oakland.

Q. What carriers do you utilize from there when you do not have one of your own equipment up there?

(Testimony of Jack F. Wootton.)

A. Well, it would be the first available or anything interlocking with our own schedule.

Q. Are you familiar with the carriers which serve Oakland? A. Yes, sir.

Q. Could you name them?

A. The largest irregular carrier would be the Currey [274] Air Transport, Great Lakes; the regular carriers would be United, Western, California Central, Pacific Southwest.

Q. With respect to that last question, your answer to my last question, have you been utilizing Pacific Southwest since April 1st of this year for transportation southward from Oakland?

A. Well, since I work about half of the time on the evening shift when I would know of that, I would say no, they haven't been. Except possibly once or twice in that time that I know of.

Q. Do you know whether the Pacific Southwest Airline tickets in the possession of North American Airlines at Burbank have been paid for by the company when they are received, or whether they are paid for afterwards? Do you know the facts on that situation?

A. I couldn't say definitely. It would be hearsay.

The Court: If you don't know, just say you don't know, and don't speculate.

Mr. Gardiner: I have no further questions.

Mr. Ackerson: I have just a few, your Honor.

(Testimony of Jack F. Wootton.)

Cross-Examination

By Mr. Ackerson:

Q. Mr. Wootton, do you know of a ticket agency named Republic Air Coach Agency? [275]

A. I have heard of it.

Q. Do you know who it is?

A. Not exactly, no.

Q. Do you know whether or not you get this particular stock of California Central from Republic Air Coach Agency or from California Central direct?

A. It seems, as I recall, the form I sign for custody of the stock is a Republic form.

Q. I think that is correct, Mr. Wootton. Do you know or have you any knowledge as to whether or not Republic Air Coach Agency buys those tickets for cash like you would apples in a bag in a grocery store?

A. No, sir, I don't.

Q. If I came to your window, Mr. Wootton, and wanted to buy a ticket on California Central lines from your office to San Francisco, would you sell it to me?

A. After securing space, yes, sir.

Q. But you would sell local California Central tickets to anybody you could get space for, wouldn't you?

A. Yes, sir.

Q. And you do sell them, I assume?

A. Yes, sir.

Q. Mr. Wootton, I think you answered this

(Testimony of Jack F. Wootton.)

question based upon lack of knowledge. I am going to ask it again, anyway. You stated that you do not know whether you work for [276] a ticket agency or an air line, or both; is that the situation?

A. I am not completely sure of the setup.

Q. But you know you sell tickets for other companies, as well as your own company, your own irregular carrier?

A. Yes, sir.

Q. And you sell tickets generally, I assume, for any number of carriers with which North American has no affiliation?

A. Yes, sir.

Mr. Ackerson: That is all.

The Court: Any further questions?

Mr. Wright: I have no further questions.

The Court: May this witness be excused?

Gentlemen, I notice it is nearly 4:00 o'clock. How many more witnesses do you have?

Mr. Wright: One, your Honor.

The Court: Well, you set this down for an order to show cause on a law and motion day. I didn't assume that it would take more than a couple of hours to dispose of it. Yesterday you all assured me that we could finish today. Now we come down to the end of the day and the plaintiff hasn't finished its case, and I suppose the defendants should have some time to present whatever evidence they have. Unfortunately, next [277] week I am going to start a motion picture case, and I don't know whether I can give you any more time. If you wanted this matter disposed of you could have presented the

evidence in less than two days, because a lot of the evidence that we have is only cumulative.

Mr. Wright: To a certain degree.

The Court: And you established the pattern in the first two or three witnesses.

You set forth the problem in your memorandum of points and authorities. There is no big problem in this case, I don't think. You set forth the problem in a very few words. However, you don't establish your problem in a few words, by any means, but you take a whole lot more time to establish the problem than in setting it forth.

You say on page 2 of your memorandum of points and authorities:

"The defendant has regularly and persistently transported persons as a common carrier for compensation and hire between various cities in the State of California, when such transportation involved the commencement or termination of an interstate journey, * * *."

That is the whole issue here. That is the only thing you complain about.

Mr. Wright: That's right. [278]

The Court: It is a very simple problem.

I doubt very much if the defendants will deny that they have done that. They may deny that it has been a regular and persistent transportation of persons. But if it has just been one, that is all that is necessary to establish a violation, and I think you are trying to establish a violation here.

Now, what is going to be our procedure? What

are we going to do? You are a long ways from home.

Mr. Wright: That is correct, Judge.

The Court: You may want to fly back on one of these lines.

Mr. Wright: I recall the Court said on Monday that it was going to be tied up next week.

The Court: Not only that, but as Mr. Ackerson knows, I am engaged in a series of motion picture cases, and every one of these plaintiffs are clamoring for a trial.

Mr. Ackerson has one and he is very much disappointed that we haven't tried his case. I don't know when we are going to get to his case, but next week is the last week I have before vacation, this court is going to be dark in August, and we are going to start a case next week and that case is going to pick up the first week in September, and we are going to go until we complete it; and when we complete that case we are immediately going to start another, and I [279] probably have two years' work here on motion picture cases. This case has been sixteen years in developing, and I don't think a couple of years is going to hurt, anyway. What are we going to do about this case?

Mr. Wright: It hasn't been sixteen years. The first action of this type was brought in 1940. I didn't mention it in the brief, because it is not reported in the books.

The Court: May I ask you this? Is this the first attempt to bring these intrastate carriers within the

Act, or is this only one of a number of cases that have been filed in various states?

Mr. Wright: There was one filed, as I mentioned, in 1940, against what was then Canadian-Colonial Airways, a certificated carrier authorized to operate between Montreal and New York, and it started an intrastate operation, Buffalo, Rochester, Albany, Syracuse, and New York, and an investigation showed that they were picking up a lot of their traffic from interstate travelers, including some of the people that they were bringing down from Montreal, and the Board started an injunction action on September 16, 1940. However, it is not reported in the books. It was in the Southern District of New York, 10-381, but it wound up with a consent decree, which was ended in December of 1940, and that is the reason it never got in the published reports.

The Court: Well, I can give you Monday afternoon, but [280] is Monday afternoon going to do any good? You haven't rested your case yet. I don't know. The defendants are certainly entitled to more than a half day to present their case.

Mr. Wright: The only witness that I have left, your Honor, is Mr. Rickey here, our investigator. He has his affidavit on file, but he spent money to buy tickets to ride on these air lines, and I hate not to have an opportunity to use him. But that would be about all his testimony would be, the fact that he made these flights on both defendants.

The Court: I am sort of impressed with the opinion of the court in Warner Bros. v. Gittone,

which is 110 F. 2d, 292. The court in that case said:

“* * * the effect of the preliminary injunction which the court granted was not to preserve the status quo but rather to alter the prior status of the parties fundamentally. Such an alteration may be directed only after final hearing, the office of a preliminary injunction being, as we have pointed out, merely to preserve pendente lite the last actual non-contested status which preceded the pending controversy.”

Now, as a general rule we grant a preliminary restraining order, preliminary injunction, to maintain the status quo until the court can determine what the real issues are. That [281] is the usual case. Very infrequently will we grant a restraining order directing people to change their present condition. They have been doing this, and you don't want me to maintain the status quo, you want me to change the status quo.

Mr. Wright: That is correct, your Honor. I don't think that case is pertinent where there is a question of a violation involved.

The Court: I don't know if there is a violation involved. I know that the Government claims there is a violation. The defendant claims there is no violation. And until I can determine there has been a violation, do I have any right to change the status quo?

Mr. Wright: I think so, your Honor. And one reason why I was a little bit more extensive in my testimony than I probably needed to be was because I got the impression from something the court said

the other day that you might consider it, in view of the motions for judgment on the pleadings, you might consider it, and you have the power to consider it as a motion for summary judgment.

The Court: We haven't had a hearing upon an order to show cause, we have had a full-blown hearing upon the merits of this case. If you tried the case tomorrow upon the merits, you would have to bring in the same witnesses and produce the same testimony. [282]

Mr. Wright: That is correct.

The Court: So what we have really been having is a trial.

Mr. Wright: That is correct, your Honor.

The Court: I am in the position to give you Monday afternoon, but after Monday afternoon I don't know what I am going to do with you.

Mr. Wright: Monday afternoon is agreeable to the plaintiff, and I assure the Court and counsel—I might even consider not using Mr. Rickey, but I wouldn't want to be criticized for spending the Government's money for evidence which I didn't use. But if I do use him it will be very brief.

The Court: If you get criticized you can blame it on the judge. That is always a good out.

Well, it is 4:00 o'clock. I like to quit at 4:00 o'clock, particularly on Friday afternoon, as I have personnel who, after court is in recess, must take care of their usual chores, so we will recess this case until 2:00 o'clock Monday afternoon.

Mr. Gardiner: Your Honor, may I inquire whether the court feels there has been sufficient

facts developed at this stage, or possibly with Mr. Rickey's testimony, to warrant and justify the argument of the motion for judgment on the pleadings and any other motion which might be made on Monday [283] afternoon?

The Court: I can't grant a motion for judgment on the pleadings if there is one fact that has to be determined. There are a lot of facts that have to be determined in this case. We have had this hearing to determine the facts, ascertain the facts. I don't think that a judgment on the pleadings would lie at this time.

I don't know what motion you can make at the end of the plaintiff's case, because this is only, primarily, a motion for a temporary restraining order.

Mr. Gardiner: One of the defendant Pacific Southwest's affirmative defenses is, "The complaint herein fails to state a claim upon which relief can be granted."

It occurred to me that it might be possible to argue a motion for dismissal upon that basis. We contend that there is a substantial legal question here that the plaintiff's proceedings are without statutory or judicial authority, and that if we could proceed upon an argument on that basis——

The Court: Supposing you just keep your argument on ice until after the plaintiff finishes its case, and then at that time—if we do stipulate that this could be considered as a trial upon the merits, rather than a hearing upon a motion for a temporary restraining order, then your motion, I think, would be in good place. You might do some home-

work during the week end and ascertain what your procedure might [284] be when the plaintiff finishes the presentation of his case.

Mr. Gardiner: Thank you.

The Court: Of course I don't know what the other witness may testify to. I assume that it will only be cumulative. But I can't assume that. He may produce some facts that are not before the Court at the present time.

We will continue this case to 2:00 o'clock Monday afternoon. Court will stand at recess until 10:00 o'clock Monday morning.

(Whereupon, at 4:00 o'clock p.m., an adjournment was taken until Monday, July 26, 1954, at 2:00 o'clock p.m.) [285]

Tuesday, July 26, 1954, 2:00 o'Clock

The Clerk: No. 16,754-HW Civil, Civil Aeronautics Board vs. Friedkin Aeronautics, Inc., doing business as Pacific Southwest Airlines and No. 16,755-HW Civil, Civil Aeronautics Board vs. California Central Airlines, Inc.

Mr. Wright: Ready, your Honor.

Mr. Gardiner: Ready.

The Court: You may proceed.

Mr. Wright: I will call Mr. Rickey.

ROBERT F. RICKEY

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Robert F. Rickey.

Direct Examination

By Mr. Wright:

Q. Mr. Rickey, are you employed by the plaintiff? A. That is correct.

Q. In what capacity?

A. As an air transport examiner in the office of compliance. [288]

Q. Have you ever had an occasion to ride on the flight of the defendant Pacific Southwest?

A. Yes, I did.

Q. When was that?

A. That was on December 17, 1953.

Mr. Wright: May this be marked for identification?

The Court: It may be marked for identification. In which case is this?

Mr. Wright: In 16,754, Pacific Southwest.

The Court: Plaintiff's Exhibit next in order.

The Clerk: Plaintiff's Exhibit 25.

(The document referred to was marked as Plaintiff's Exhibit No. 25 for identification.)

The Court: And 26?

(Testimony of Robert F. Rickey.)

Mr. Wright: I think they can be marked as one exhibit, your Honor.

The Court: 25 for identification only then.

Q. (By Mr. Wright): Will you tell us between what points you were carried by Pacific Southwest?

A. Between San Diego and Burbank, California.

Q. Prior to December 17, did you make a reservation or attempt to procure passage on the Pacific Southwest?

A. Yes. I requested a reservation from San Diego to Chicago.

Q. To whom did you make that request? [289]

A. That request was made of Mr. Frank S. Ambler, who represented Transocean Airlines in San Diego at that time.

Q. Were you able to make a reservation?

A. Yes.

Q. And thereafter did you purchase a ticket?

A. Yes. Mr. Ambler sold me a ticket.

Q. On what day was that?

A. The purchase was made on December 17, the morning of the day on which I made the flight.

Q. I show you Plaintiff's Exhibit No. 25 for identification, which consists of two sheets, which are photostats of purported tickets, and ask you whether or not the originals of those were ever in your possession?

A. Yes, they were.

Q. From whom did you receive them?

A. This ticket jacket containing the two tickets was obtained from Mr. Ambler.

(Testimony of Robert F. Rickey.)

Q. You are referring to the first page of Exhibit 25 for identification?

A. Yes, that is correct.

Q. And what use did you make of the tickets which you procured from Mr. Ambler?

A. I used these tickets to obtain passage from San Diego to Burbank, and then from Burbank to Chicago, Illinois.

Mr. Wright: I offer Exhibit 25 in [290] evidence.

Mr. Gardiner: If the Court please, I should like to object to the introduction of this exhibit on the grounds stated at the outset of this hearing last week. Page 1 of this exhibit shows some tickets which are superimposed on each other. The terms and tariff conditions and other conditions of which we are not aware are accordingly obscured by the Pacific Southwest Airlines ticket. The exhibit apparently does not constitute a correct representation of what it purports to be.

The Court: Overruled. It may be received as Exhibit No. 25.

The Clerk: Plaintiff's Exhibit 25.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 25.)

Q. (By Mr. Wright): Referring now, Mr. Rickey, to Exhibit 25, and particularly the first page thereof, does that contain one or more than one ticket?

(Testimony of Robert F. Rickey.)

A. That is made up of two tickets.

Q. And both of these tickets were received by you, were they not, from Mr. Ambler?

A. Yes. They were received at the same time. The one was stapled inside the jacket of the other ticket.

Q. In the same manner as it appears in the first page of Exhibit 25? A. That is correct.

Q. What does the second page of Exhibit 25 consist of? [291]

A. The second page is a photostatic copy of the reverse side of the Pacific Southwest ticket, which appears on the first page of Exhibit 25 stapled inside the folder of the Sky Coach ticket.

The Court: Where did you say you got this ticket?

The Witness: From Mr. Frank Ambler, sir, in San Diego, and he represented Transocean Airlines at that time.

The Court: Is he a ticket agent?

The Witness: Yes. He did sell on other carriers.

The Court: He was not an employee of Pacific Southwest except in the sense of selling tickets for Pacific Southwest?

The Witness: No, sir. My understanding is he was merely an agent representing Pacific Southwest, California Central, and several other carriers, for the sale of tickets, that is correct.

Q. (By Mr. Wright): After you received the tickets from Mr. Ambler, will you tell us what you did that day?

(Testimony of Robert F. Rickey.)

A. Yes. When I received the tickets from Mr. Ambler and paid cash for them, he advised me that the Pacific Southwest space had not been definitely confirmed for that evening, but that he would phone me at my hotel as soon as it was, the space was definitely confirmed. Later that morning, around noon, he called and said that the space had been cleared for me on Pacific Southwest Flight 715 for that evening. He advised me to check in at the ticket counter of Southwest, Pacific [292] Southwest Airlines at Lindbergh Field no later than 6:45 that evening.

I went out to Lindbergh Field that evening and checked in for this flight and presented the ticket just as it appears in this exhibit, with the Pacific Southwest Airlines ticket stapled inside the Sky Coach folder.

Q. To whom did you present the ticket in that manner?

A. It was presented to the ticket agent at the Pacific Southwest Airlines ticket office at Lindbergh Field.

Q. What happened after that?

A. I mentioned to the ticket agent, or I asked him about the imprinting on the reverse side of the Pacific Southwest, stating that the airline reserved the right to refuse passage to any passenger going outside of the state, and he told me at that time that I would not have to be concerned about that, that it was an entirely different deal, is the way he ex-

(Testimony of Robert F. Rickey.)

pressed it, and that this was an old ticket form which they were not using much any more.

Q. Thereafter did you board Pacific Southwest aircraft? A. Yes, I did.

Q. At the time you boarded the aircraft, did you still have both the tickets which appear on the first page of Exhibit 25? A. Yes.

Q. Did there come a time when someone picked up the [293] tickets or a part of the ticket?

A. Yes. The hostess aboard the Pacific Southwest Airline flight removed the flight ticket portion of the PSA ticket after the flight had left the ground at San Diego.

Q. Did you have any conversation with the stewardess?

A. Yes. On the ground before we left the gate, she was checking coats, passengers' coats, and she asked me how far I was going, and I told her I was destined to Chicago. She said at that time that she would check my coat as far as Burbank, and I would change planes in Burbank and get a flight to go on to Chicago.

Q. What happened after you arrived at Burbank?

A. Upon arrival in Burbank, I went around in front of the Terminal Building and claimed my luggage. Both Mr. Ambler and the ticket agent at the PSA counter in San Diego had told me that that would be necessary, that I obtain my baggage from in front of the Lockheed Air Terminal and then recheck it at the Skycoach counter upon arrival in Burbank.

(Testimony of Robert F. Rickey.)

So I claimed the luggage and presented it at the Sky Coach counter to be checked on to Chicago.

Q. Did you travel to Chicago by means of another aircraft? A. Yes, I did.

Q. The same evening? A. Yes. [294]

The Court: On that ticket?

The Witness: Yes, sir. On the Sky Coach ticket portion of this Exhibit 25.

Mr. Wright: That's all the questions I have of this witness regarding the PSA flight. I have some tickets on the flight of California Central.

Mr. Gardiner: I have one or two questions.

The Court: All right.

Cross-Examination

By Mr. Gardiner:

Q. Do you know the name of the Pacific Southwest Airlines ticket agent in San Diego whom you encountered when you checked in?

A. No, I do not.

Q. You didn't ask his name as did the witness Chambers in the incident to which he testified about? A. No, I did not get his name.

Mr. Gardiner: That's all, your Honor.

Further Direct Examination

By Mr. Wright:

Q. Now, Mr. Rickey, I ask you whether or not you have ever ridden on a flight of California Central Airlines? A. Yes. [295]

Q. And when was that?

(Testimony of Robert F. Rickey.)

A. That was March 9, 1954.

Q. And from where to where did you ride?

A. That trip was made between Los Angeles and San Francisco. Actually, the flight departed from Burbank, because of weather below limit at Los Angeles International Airport.

Q. Was that trip from Los Angeles to San Francisco the only flight you made that day?

A. No. I had just previously arrived on Western Airlines Flight 31 from Las Vegas, Nevada.

Q. At Los Angeles International Airport?

A. Yes.

Q. On arrival at Los Angeles International Airport, what did you do?

A. I went to the California Central Airlines ticket counter where I talked with an agent by the name of Edward Winslow. I inquired about the ship to San Francisco, the time of departure of the next flight, and he advised me that the next flight left at 7:25 p.m. for San Francisco.

In talking with agent Winslow, I mentioned at least twice that I had arrived from Las Vegas, Nevada, on Western Airlines.

Q. Did you make a reservation?

A. Yes. He made the reservation for me and sold the [296] ticket.

Q. I believe you previously testified that the plane did not leave from Los Angeles International Airport?

A. That is correct. It was scheduled to leave from there, but the weather went below limits be-

(Testimony of Robert F. Rickey.)

fore the flight departed, so they transferred the passengers from International Airport to Lockheed Air Terminal, Burbank, by taxi, and the passengers took the flight from there.

Q. And what time did you arrive in San Francisco?

A. About 10 minutes after 10:00 that same evening.

Mr. Wright: May this be marked for identification as one exhibit?

The Court: It may be marked Plaintiff's Exhibit 11 for identification.

The Clerk: 11 for identification. This is in 16,755.

(The document referred to was marked as Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Wright): Mr. Rickey, I show you Plaintiff's Exhibit marked No. 11 for identification, which consists of two sheets purporting to be photostatic copies of a ticket envelope and a ticket stub, and ask you whether or not that was previously in your possession? A. Yes, it was.

Q. From whom did you receive it?

A. This was obtained from Agent Winslow at the [297] California Central Airlines ticket counter.

Q. Was that presented to you by the ticket agent at California Central Airlines, the ticket agent?

A. Yes. When the ticket was sold to me, Agent Winslow removed the flight coupon portion of the ticket at that time, and the only portion I received

(Testimony of Robert F. Rickey.)

was the folder with the passenger receipt portion of the ticket in it, as Exhibit 11 shows.

Mr. Wright: I offer Exhibit No. 11 for identification in evidence.

The Court: It may be received in evidence.

The Clerk: Exhibit 11.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 11.)

Q. (By Mr. Wright): Now, Mr. Rickey, referring to the second page of Exhibit No. 11, and particularly that portion which appears right beneath the candy stripe, will you tell us what that represents?

A. Yes. That is the passenger receipt portion of the ticket which was sold me by Agent Winslow.

Q. And what happened to the balance or the flight coupon?

A. That was picked up by Agent Winslow when he sold the ticket to me.

Mr. Wright: I have no further questions. [298]

The Court: Any questions?

Mr. Ackerson: I have no questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Wright: The plaintiff has no further evidence to offer at the preliminary hearing, your Honor.

The Court: Before you present any testimony, if you want to present any testimony relative to the issue before the court, the government has stated the case, I think, very clearly. The defendant has regularly and persistently transported persons as a common carrier for compensation and hire between various cities in the State of California when such transportation involved the commencement or termination of an interstate journey.

We have testimony before us from the various witnesses that I think definitely establishes that the defendants transported passengers when the transportation involved the commencement or termination of an interstate journey.

If you have got any testimony to the effect that the witnesses who testified didn't testify correctly, that might be a point.

Mr. Ackerson: I don't think there is any doubt but what we have transported such passengers, your Honor. Of course, we maintain that it is a de minimis proposition, which it is, but [299] I don't think that is particularly pertinent, either.

The Court: Of course, the government asks for a restraining order, a broad restraining order based on the section. If I grant a restraining order, I am going to grant a specific restraining order, not a broad restraining order, specifically restraining them from transporting passengers which involves the commencement or termination of an interstate journey.

Now, I don't know how you are going to enforce it, because unless the passengers will tell the trans-

portation companies that they have just come in from New York or Chicago or from the Hawaiian Islands, and want to go on to San Diego, I don't know how they are going to know it. Or if somebody down in San Diego wants to go to Chicago and buys a ticket to come to Los Angeles, and then buys another ticket up here, I don't know how in the world you are going to enforce such a restraining order. I am not satisfied in my own mind yet that the regulation in question even prohibits the things set forth by the government. I don't know whether the regulations do or not.

Mr. Ackerson: May I interject, your Honor?

The Court: Yes.

Mr. Ackerson: If you line up the express allegations of the complaint with the very explicit allegations in the act, I think the government has factually and legally pleaded itself [300] without the Act. They rely on 481, and that is what they are bringing this case on.

The Court: I know what your contention is, and that is your argument, but, however, I don't know whether that is the law or not. I know what your argument is.

Mr. Ackerson: In line with the absolute enforceability of an injunction, your Honor, you have spoken of policing the injunction if it were issued. To begin with, it would be an absolute impossibility. The evidence would show that during the time, just September 30 to July 1, my client has carried about 134,000 passengers. This testimony indicates that maybe a couple hundred or

three or four hundred of those came off an intra-state plane and were going to get on an interstate plane.

The Court: But supposing the government could only establish you carried one? The government is still entitled to a restraining order restraining you from carrying the one passenger.

Mr. Ackerson: Well, your Honor, please, I don't know. The whole Act refers to airplanes crossing the state line. That is true even with the safety regulations. Let's suppose we fly a certain limited, negligible number, compared to our entire business, of this type of passenger. If the government is relying upon that, then it has got to construe this statute like, well, the Sherman Act, for instance, with which your [301] Honor is acquainted. In other words, the effect upon interstate commerce has to be shown, and there has been no evidence here to show effect. So even under their construction it would be a *de minimis* process.

The Court: That is not the law in air transportation.

Mr. Ackerson: No, it is not.

The Court: It is not whether it has an effect upon interstate commerce.

Mr. Ackerson: No. The plane must be in interstate commerce and the passenger's past or future intention doesn't enter into it.

The Court: You say the plane must be in interstate commerce?

Mr. Ackerson: Yes.

The Court: Where is your authority?

Mr. Ackerson: Section 121(1) of the Act.

The Court: Have you got the Act there?

Mr. Ackerson: Yes, I have got the Act here.

The Court: Let me see it. If it says the plane has to be in interstate commerce, these planes don't cross a state line, as far as the testimony here is concerned.

Mr. Ackerson: That's right. Their complaint says we fly between points in California. Here is 121, your Honor. There is nothing about passengers in there.

The Court: Did the defendants have to be in interstate [302] air transportation?

Mr. Ackerson: This is the subsequent section, your Honor, that this action is based on. Only people engaged in air transportation need certificates, and that is what they are trying to show in this case.

The Court: What is the meaning of air transportation? If they are engaged in air transportation, then they have to have a certificate of public convenience and necessity. If they are not, they don't have to have it.

Mr. Ackerson: On that question, as we state, we have no judicial construction of the Act, your Honor. We think the Act is plain on its face, but we have got the oldest and only living board member who construes the Act, we say, according to the quotations we have given in the brief, Oswald Ryan. He is still a member of the Board. He said the

federal government has never legislated on this type of thing.

The Court: I might ask Mr. Wright, then, have any of the courts ever definitely decided what is meant by air transportation?

Mr. Wright: There is no decision, no, your Honor. There was that case I mentioned the other day in the Southern District of New York.

The Court: I am not in a position to rule on this matter today. I don't know when I will be in a position to rule upon it. We have got the facts pretty well established as far as [303] these two cases are concerned. I guess the only thing I can do is take the matter under submission. If you want to file any points and authorities, I will be more than glad to give you time to file a brief, if you want to, with points and authorities.

Mr. Wright: Well, we have already filed two.

The Court: Are you satisfied with your memorandum of points and authorities on record?

Mr. Wright: Yes.

The Court: Are you satisfied with your points and authorities?

Mr. Ackerson: Your Honor, I have cited cases. If it would be of any convenience to the Court, I would elaborate upon the citations.

The Court: No. I am interested in the cases and not in your quotations. I like to read the cases as a whole.

Mr. Ackerson: Then I am satisfied.

Mr. Gardiner: I am satisfied with the points and authorities from Pacific Southwest. I would like,

however, to present two additional motions, if your Honor sees fit.

The Court: What are the motions?

Mr. Gardiner: I would like to move that the case in 16,754-HW be dismissed upon the ground that the complaint fails to state a claim upon which relief can be granted.

With respect to that motion, I am making that in the [304] type of a motion for dismissal similar to a general demurrer. I don't think the complaint states any grounds at all.

Further, I would like to move the dismissal of the case here on the ground that the facts set forth in the testimony and in the affidavits of the plaintiff and the law applicable thereto, do not present a case for which the plaintiff is entitled to relief.

The Court: I would be very happy to entertain your motions. I will take your motions under submission. But I am just a little bit doubtful as to your right at this time to make such a motion. This is a hearing upon an order to show cause why a temporary order should not be made. Now, at the conclusion of the testimony upon an order to show cause for a temporary restraining order or temporary injunction, do you have a right to make a motion to dismiss the entire case? I am rather doubtful.

Mr. Gardiner: I believe on the second motion, there could be some doubt, but it would seem to me the first or initial motion, namely, no cause of action stated, would be suitable for presentation at any stage during the proceeding. If there is no cause of action stated, it would seem to be of little

avail to continue on with the trial. I believe that motion to be similar to a general demurrer, and that was the intent in setting up that affirmatively in the answer.

The Court: Well, the whole issue in this case is whether [305] or not the defendants are engaged in air transportation. Suppose I find they are not engaged in air transportation, for the purpose of the motion, that is the temporary restraining order, can I go one step further and hold because they are not engaged in air transportation from the evidence produced, I can dismiss the case? If this was a hearing upon the merits, there would be no argument in my mind. I will take the motions under submission. I suggest you review the rules and see what the rules have to say about the timing of your motion.

Mr. Gardiner: The first motion, as I gather from a recent review, should be simultaneous with or prior to the answer. However, the pleading of a motion for judgment on the pleadings has sometimes been construed as a motion to dismiss, and the fact that the motion was raised in the answer, the allegation was made in the answer as an affirmative defense, that the complaint failed to state a cause of action, would seemingly entitle the defendants to argue that point now.

The Court: Of course, this is the situation. This is a preliminary skirmish. It is conceivable, it may not be probable, it is conceivable that at the time the matter is tried upon its merits, the government

may have more information and more evidence. Now they have presented all the evidence they have on this preliminary motion. I am justified in denying their request because the evidence doesn't sustain their contention, but am I justified in taking evidence they produce at [306] the preliminary hearing to then, ipso facto, without any other evidence at all, decide they haven't got a case and dismiss it?

Mr. Gardiner: No, your Honor. We are in agreement with that position. We are willing to go further. By making this motion to dismiss now, alleging that the complaint does not support facts to afford relief, we are conceding, for the purpose of arguing the motion, that all the allegations of the complaint are correct, namely, that the defendant is transporting a substantial number of passengers from airports in California who previously or subsequently moved into or out of the state. That is why we think it is appropriate to argue at this point.

The Court: I am just thinking about the Partmar case. In that case after the hearing upon the case in chief, I decided the counterclaims without any evidence. The Supreme Court said I was right and I had jurisdiction to do that. But the counterclaimants didn't say that. But I decided from the evidence introduced that there was no evidence of a conspiracy, and consequently if there was no conspiracy, the counterclaim would be a needless and idle act.

Mr. Ackerson: May I make a suggestion?

Mr. Gardiner: I wanted to present oral argument upon these motions.

The Court: It is not necessary to produce any oral argument. I would like to have you review the rules. I am not [307] satisfied your timing is right.

Mr. Ackerson: Your Honor, I would like to adopt the same motion Mr. Gardiner made in the Pacific Southwest case in the case No. 16,755-HW Civil. Civil Aeronautics Board vs. California Central Airlines, Inc.

Since this matter is going to be briefed on the rules, anyway, I would like to offer an additional motion that the complaint be dismissed upon the ground that the court does not have jurisdiction over the subject matter. That is based on this, your Honor, and I will brief it for you, but I would like to make that motion at this time for this reason. Taking the allegations as true, in other words, they state affirmatively we fly between one point in California and another point, that, taken in connection with the law, would seem to me sufficient grounds to enable your Honor to pass upon that jurisdictional question under this type of motion. Rule 13(h)(2) provides that whenever it appears by suggestion of parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. That is at any time. It could be in the middle of trial. It could be any time after the filing of the complaint, as I read the rule. I will check it more thoroughly.

The Court: Let me ask Mr. Wright a question.

Mr. Wright, suppose I would find that these defendants are not engaged in air transportation. Would I have jurisdiction? In order to [308] have jurisdiction, I have got to find they are engaged in air transportation, do I not?

Mr. Wright: I would say so, your Honor.

The Court: If I find they are not, I could dismiss for want of jurisdiction.

Mr. Wright: I think so.

The Court: Fine. No problem then.

Mr. Wright: If your Honor please, while the matter of motions is being discussed here, the plaintiff has an additional motion which was filed returnable last Monday and was overlooked at that time, in 16,754-HW, to amend the complaint where we erroneously alleged that the defendant Friedkin was a Nevada corporation. We move to amend to substitute the word California for Nevada.

The Court: I don't think there will be any objection. Motion granted.

Mr. Gardiner: No objection. Possibly counsel might prefer to amend to also allege the principal place of business of the defendant is in San Diego, as alleged in our answer.

The Court: What did they allege?

Mr. Gardiner: They alleged Burbank. The company is in Burbank in business.

The Court: Does it make any difference for the purposes of this action?

Mr. Gardiner: No. [309]

The Court: I will take the matter under submission, but I can't offer you any information as

to when I will come to a conclusion, as next month this court will be dark, so you will have to wait until probably after the first of September. Inasmuch as we have no published opinions in regard to this important subject, I think maybe I will write an opinion, a memorandum setting forth the facts and the conclusions of the court, so that next time you can go into court and say that there is an opinion on record.

Mr. Wright: We will appreciate that, no matter which way it goes.

Mr. Gardiner: Judgment on pleadings is submitted, too?

The Court: Submitted. I will take that under submission.

Mr. Ackerson: If your Honor please, I said I was satisfied with my points and authorities on file. I would like to file a few excerpts.

The Court: Any party may submit additional points and authorities any time up to September 1. It may be some court will make a decision between now and September 1, that will determine this matter.

Court will stand in recess now. [310]

Certificate

We hereby certify that we are duly appointed, qualified, and acting official court reporters of the United States District Court for the Southern District of California.

We further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of our stenographic notes.

Dated at Los Angeles, California, this 17th day of November, 1954.

/s/ S. J. TRAINOR,
Official Court Reporter;

/s/ SAMUEL GOLDSTEIN,
Official Court Reporter;

/s/ ARLENE JENKINS,
Official Court Reporter.
(Pro Tem.)

[Endorsed]: Filed February 2, 1955. [311]



**In the United States Court of Appeals
for the Ninth Circuit**

CIVIL AERONAUTICS BOARD, APPELLANT

v.

**FRIEDKIN AERONAUTICS, INC., D/B/A PACIFIC
SOUTHWEST AIRLINES, APPELLEE**

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

**APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA**

REPLY BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

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ROBERT L. PARK,
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FILED

AUG - 3 1955

PAUL R. O'BRIEN, CLERK

In the United States Court of Appeals for the Ninth Circuit

No. 14648

CIVIL AERONAUTICS BOARD, APPELLANT

v.

FRIEDKIN AERONAUTICS, INC., D/B/A PACIFIC
SOUTHWEST AIRLINES, APPELLEE

No. 14649

CIVIL AERONAUTICS BOARD, APPELLANT

v.

CALIFORNIA CENTRAL AIRLINES, INC., APPELLEE

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA*

REPLY BRIEF FOR APPELLANT CIVIL AERONAUTICS BOARD

Appellant deems it appropriate to file this reply brief in order to clarify the fundamental question presented to the Court for decision. We demonstrate below that the arguments advanced in the brief of appellee Pacific Southwest are neither apposite to the determination of that question nor otherwise meritorious.

I

Appellee's first contention is that the definition of interstate air transportation contained in the Civil

Aeronautics Act (Sec. 1 (21)), which governs the scope of appellant's economic regulatory jurisdiction, does not, under any circumstances, extend to common carriers by air unless their aircraft physically cross state lines. Having thus stated the proposition, appellee leaves it completely unsupported. Instead of giving attention to the language of the statute itself, appellee points to law review articles (Br., pp. 8-10), court decisions (Br., pp. 11-13), the report of the President's Air Coordinating Committee (Br., p. 14), and recent proposed amendments to the Civil Aeronautics Act (Br., pp. 19-20), all of which are primarily concerned with the problem of whether Congress through that Act has asserted exclusive economic regulatory control over intrastate air carrier operations.

Although perhaps interesting as an abstract legal dissertation, appellee's treatment of this question has no bearing on the basic issue here involved. As we have pointed out (appellant's brief pp. 4, 5, 9, 13), there is no question presented in these actions as to whether Congress has preempted or occupied the field of economic regulation of intrastate common carriers by air. Thus, whether intrastate operations, regardless of the nature of the traffic carried, may "affect" or "burden" interstate commerce is not a pertinent consideration.¹ Rather, the crux of the problem is

¹ The Board's reference to the termination of appellee California Central's operations as having a negligible effect upon interstate air transportation (Br., pp. 16, 17) was made in a proceeding involving the question of approval of inter-air carrier transactions under sections 408 and 412 of the Act (49 U. S. C. 488; 49 U. S. C. 492), in which antitrust and monopoly considerations are domi-

whether intrastate carriers, such as appellees, who participate as integral parts of substantial and continuous interstate movements, are within the coverage of the statutory definition of interstate air transportation. We think it plain from the face of the statute, as well as its legislative history and applicable case law, that they are (appellant's brief, pp. 9-16). Appellee's references to matters of preemption, occupation or usurpation of the field of intrastate carriage avails it nothing in the circumstances of the present actions.

Appellee's misapprehension of the nature of the problem is exemplified by the treatment accorded the article by Mr. Oswald Ryan, former member of the Civil Aeronautics Board, in the *Virginia Law Review* (Br., pp. 8-10). In the quoted portions of the article, Mr. Ryan discusses the differences in the regulatory pattern for the economic and safety aspects of air carrier operations and the general question of federal control over intrastate air carriers, neither of which, of course, are determinative of the present issue. What appellee apparently overlooked, however, is the following passage in Mr. Ryan's article, the only one here pertinent (at p. 483):

The Civil Aeronautics Act of 1938, as previously noted, limited its economic control to air transportation defined as interstate, overseas or foreign air transportation or the transportation of mail by aircraft. Thus, non-mail air

nant, and obviously this determination has no relevancy to the question of appropriate certificate authority being required for unauthorized operations.

carriers whose routes lie wholly within the limits of a single state *and which do not transport traffic moving in interstate commerce* are not included within the terms of the act. [Emphasis supplied.]

II

Appellee next adverts to several administrative and judicial decisions which it construes as supporting its argument that the Board has no jurisdiction over the type of operations disclosed by the present record.

Administrative determinations that appellee's primary business may be that of providing intrastate air transportation for the purposes of interpreting the coverage of the Railway Labor Act (Br., p. 24) or the National Labor Relations Act (Br., p. 25) are, of course, no authority for the proposition that upon the facts of this record appellees cannot be found to have engaged in interstate commerce as to a substantial portion of their operations. Neither of the agencies concerned passed upon the facts here involved nor are they competent to determine the applicability of the Civil Aeronautics Act. Moreover, appellee's reliance on the cases of *New York Central R. Co. v. Mahoney*, 252 U. S. 152 (1920) (Br., p. 28) and *Gulf, Colorado & Santa Fe Railway Co. v. Texas*, 204 U. S. 403 (1907) (Br., p. 29) is plainly misplaced. To the extent that these cases can be said to hold that, for regulatory purposes, the contract between passenger and carrier alone determines whether the commerce is interstate or not, they have been implicitly overruled by later Supreme Court decisions. (Appellant's

brief, p. 7, fn. 2; p. 17; p. 20, fn. 14.) Clearly, the nature of the contract is but one factor to be considered in determining the essential character of the commerce as interstate or intrastate.²

Appellee's efforts to distinguish the *Capital Transit* cases and thereby avoid the sweep of those decisions must also fail. The Court there had before it the issues *inter alia* of (1) whether Transit's operations constituted "interstate transportation" for the purpose of ordering through-fare arrangements, or (2) whether they were within a proviso of section 216 (e) of the Motor Carrier Act exempting "intrastate transportation" of motor carriers from regulation by the Interstate Commerce Commission. In the second *Capital Transit* case [338 U. S. 286], the Court said (at p. 290):

* * * Our previous holding [325 U. S. 357] was that all of Transit's intra-District carriage of passengers bound to and from the Virginia establishments was part of an "interstate" movement and therefore subject to Commission regulation throughout, upon proper Commission findings. *United States v. Yellow Cab Co.*, *supra*, does not conflict with our prior holding

² The case of *Pennsylvania R. R. Co. v. Knight*, 192 U. S. 21 (1903), also cited by appellee is equally unpersuasive. In that case the Court held that a cab service from New York City to the Jersey City ferry, operated by a railroad for the convenience of its passengers at the latter's expense, was a local service and therefore subject to a New York tax. It is well established that tax questions depending upon interstate commerce are not authority in cases involving federal or state regulation of commerce. *Hanley v. Kansas City Southern Ry.*, 187 U. S. 617, 621 (1903); *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466 (1938).

that Transit's transportation was part of a continuous stream of interstate transportation. We adhere to that holding. Transit's intra-District streetcar and bus transportation of passengers going to and from the Virginia establishments is an integral part of an interstate movement.

The *Capital Transit* decisions thus plainly control the present actions.

III

The balance of appellee's brief is directed to the facts developed in the record. Appellee's position seems to be that the carriage of interstate passengers by them has been *de minimus* (Br., p. 36), or "virtually *de minimus*" (Br., p. 6); that interstate activities resulted from the action of ticket agents for non-scheduled carriers rather than their own employees (Br., pp. 2, 35); and that their "arrangements" with other carriers amount to no more than the simultaneous sale of tickets upon the lines of such carriers and appellees by independent ticket agencies (Br., p. 6). Appellees also profess an inability to ascertain the true origin or destination of their passengers or to otherwise guard against interstate carriage (Br., pp. 34, 36).

There can be no reasonable doubt that appellees are, in the regular course of business, participating without restriction in the transportation of interstate passengers and that that participation is substantial. There is no ambiguity in the Court's findings on this score (14648, pp. 78, 84). If any further clarification is needed of the Court's views in this respect, it can

be found in the following statement by the Court after the conclusion of the hearing (R. 360) :

The COURT. Before you present any testimony, if you want to present testimony relative to the issue before the court, the government has stated the case, I think, very clearly. The defendant has regularly and persistently transported persons as a common carrier for compensation and hire between various cities in the State of California when such transportation involved the commencement or termination of an interstate journey.

We have testimony before us from the various witnesses that I think definitely establishes that the defendants transported passengers when the transportation involved the commencement or termination of an interstate journey.

If you have got any testimony to the effect that the witnesses who testified didn't testify correctly, that might be a point.

The record is also replete not only with documentation of specific flights but also with facts designed to show that the carriage of such passengers was virtually a daily occurrence over protracted periods of time (14648, pp. 16, 18, 25, 36, 38; 14649, pp. 26, 34). The evidence thus advanced was not disproved or controverted by appellees, who offered no evidence.³

³ It should also be pointed out that appellee's argument concerning *de minimus* is at variance with the contention in Point I of its brief that the Board's economic control does not attach unless state lines are crossed. If the latter were true, presumably appellees could carry passengers in the process of an interstate journey without limitation. Moreover, were the *de minimus* doctrine to be applicable (which is plainly not the case here), it

Appellees' protestations regarding lack of knowledge of the interstate character of their business and the absence of arrangements with transcontinental interstate air carriers cannot be accepted. To the extent that appellees may be attempting to disclaim the activities of ticket agents with whom they transact business, it is clear that they cannot do so. Appellees are fully chargeable with knowledge of and responsibility for those activities. *Air Transport Associates, Inc. v. Civil Aeronautics Board*, 199 F. 2d 181, 186 (C. A. D. C., 1952), cert. den., 344 U. S. 922 (1953). Moreover, the evidence leaves no doubt that appellee's participation in the interstate movement is undertaken with full knowledge that they are transporting interstate passengers. This knowledge stems from persons such as operations agents, reservationists, and pilots, all of whom are direct employees of appellees (R. 184, 218, 219, 264, 289, 319, 357).

Similarly, the existence of close working arrangements between appellees and the transcontinental non-scheduled carriers is apparent from the face of the record. These are not limited to "the simultaneous sale of tickets," as appellees would have the Court believe. Thus arrangements for onward passage on appellees' aircraft are normally made in advance of the arrival of a nonscheduled carrier at Burbank; the passenger is, for all practical purposes, treated as a through passenger moving on one ticket from origin to would simply mean that the volume of traffic carried was so insignificant that the exercise of jurisdiction was not warranted, and *not* that the carriage of interstate traffic by an intrastate carrier does not constitute interstate air transportation.

destination; and the cost on the intrastate leg of the journey is not paid by the individual passenger but is absorbed by the transcontinental carriers upon receipt of a billing from appellees therefor. These facts, together with those outlined in more detail in our opening brief (appellant's brief, pp. 16-20), admit of no conclusion but that appellees are knowing and willing participants in the interstate movement.

We reiterate that appellant here is asserting the applicability of section 401 and the other economic regulatory provisions of the Civil Aeronautics Act only to those operations of appellees which constitute interstate commerce as that term is commonly understood and applied. There is no question of conflict between federal and state regulation, and regulatory action by both State and national governments within their respective spheres is perfectly compatible.⁴ We recognize that there might be situations in which it would be difficult for an intrastate carrier to determine whether its passengers are in interstate trans-

⁴ So far as we are aware, the Public Utilities Commission of California does not claim power to regulate the interstate operations of intrastate carriers. Indeed, the Commission appears to have specifically disclaimed such power. In litigation before the Supreme Court of California the Commission stated that "also by way of preliminary remarks the Commission wishes this Court clearly to understand that the Commission does not seek to exercise any jurisdiction over interstate fares. The only fares of air carriers which are considered subject to the Commission's jurisdiction and which the Commission seeks to regulate are intrastate fares charged intrastate passengers." Answer of the P. U. C. of Calif. to petition for writs of review (filed June 29, 1951), *United Air Lines, Inc. and Western Air Lines, Inc. v. Public Utilities Commission of California*, Case Nos. 18426 and 18427, Supreme Court of California, review denied August 2, 1951 (unreported).

portation. But that problem is not presented to the Court by the facts of this case. The interstate transportation here involved is of substantial volume, and is provided with full knowledge of its nature and under arrangements with connecting carriers. Appellees have it within their power to dissolve these arrangements and to adopt other measures to minimize the likelihood of interstate carriage. Until they have done so, however, these activities clearly are in violation of the statute and should be enjoined.

CONCLUSION

For the foregoing reasons, and those set forth in our opening brief, the judgments of the District Court should be reversed with instructions to issue preliminary injunctions.

Respectfully submitted.

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AUGUST 1955.



No. 14649

**United States
Court of Appeals**
for the Ninth Circuit

CIVIL AERONAUTICS BOARD,
Appellant,
vs.

CALIFORNIA CENTRAL AIRLINES, INCORPORATED,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 54)

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**



No. 14649

**United States
Court of Appeals**
for the Ninth Circuit

CIVIL AERONAUTICS BOARD,
Appellant,
vs.

CALIFORNIA CENTRAL AIRLINES, INCOR-
PORATED,
Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 54)

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Southern District of
California, Central Division

Civil No. 16755-C

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

CALIFORNIA CENTRAL AIRLINES, INCOR-
PORATED,

Defendant.

COMPLAINT FOR INJUNCTION

The plaintiff, the Civil Aeronautics Board, hereinafter sometimes referred to as the Board, by its attorneys, complaining of the defendant, alleges as follows:

1. The jurisdiction of this Court is based upon section 1007 of the Civil Aeronautics Act of 1938, as amended (52 Stat. 1025, 49 U.S.C. 647).

2. The plaintiff is the Federal regulatory agency created by the Civil Aeronautics Act of 1938, as amended (Act of June 23, 1938, Ch. 601, 52 Stat. 997; Reorg. Plan No. IV, Section 7, eff. June 30, 1940, 5 Fed. Reg. 2421, 54 Stat. 1235, 49 U.S.C. 401, et seq., hereinafter sometimes referred to as the Act), charged with the responsibility for the regulation of air transportation and the performance of certain duties [2*] prescribed in said Act, including the issuance to air carriers of certificates

*Page numbering appearing at foot of page of original Certified Transcript of Record.

of public convenience and necessity and other authority to engage in air transportation, and causing to be instituted appropriate proceedings for the enforcement of the provisions of such Act against air carriers engaging in air transportation without authority therefor from the plaintiff.

3. The defendant, a citizen of the United States, was at all times herein mentioned and now is a corporation organized and existing under the laws of the State of Nevada, having its principal offices and carrying on business within the Southern District of California at Lockheed Air Terminal, Burbank, California.

4. Section 1(2) of the Civil Aeronautics Act (52 Stat. 977, 49 U.S.C. 401(2)) defines the term "air carrier" as used therein to mean any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation. The term "air transportation" is in turn defined by sections 1(10) and 1(21) of the Act (52 Stat. 977, 49 U.S.C. 401(10) and (21)). The terms "air carrier," "air transportation" and "interstate air transportation," wherever they appear herein, are used in the sense defined by the said sections 1(2), 1(10) and 1(21) of the Act.

5. The Civil Aeronautics Act, particularly section 401(a) thereof (52 Stat. 987, 49 U.S.C. 481(a)), prohibits any air carrier from engaging in "air transportation" unless there is in force a certificate of public convenience and necessity or other author-

ity issued by the plaintiff authorizing such air carrier to engage in air transportation. Section 416(b) of the Act (52 Stat. 1004, 49 U.S.C. 496(b)) empowers the plaintiff, under certain conditions, to exempt air carriers from the necessity of compliance with certain provisions of the Act, including the requirements of section 401(a) thereof.

6. Since 1949 and to the date hereof, the defendant has been engaged in the operation of flights of aircraft between various places in the State of California, including San Diego, Burbank, San [3] Francisco and Oakland on which flights it has been and is carrying passengers as a common carrier for compensation and hire. The defendant does not have a certificate of public convenience and necessity, an exemption under section 416(b) of the Act (52 Stat. 1004, 49 U.S.C. 496 (b)), or any other authority from the plaintiff authorizing it to engage in air transportation.

7. Beginning prior to September 1, 1953, and continuing to the date hereof, defendant has carried on the flights operated by it between points within the State of California, a substantial number of persons the origination or destination of whose journeys have been places outside the State of California.

8. By reason of the activities and practices described in paragraph 7 hereto, the defendant has engaged in interstate air transportation as an air carrier within the meaning of the Act. Since the

defendant has not been issued a certificate of public convenience and necessity or other authority authorizing it to engage in such air transportation, the defendant has thereby violated section 401(a) of the Act.

9. The plaintiff is informed and believes and, therefore, alleges that the defendant will persist in the activities and practices hereinbefore described, and unless it is promptly restrained and enjoined as hereinafter prayed, it will continue to commit the aforesaid violations of the said Act.

10. A judgment by the Court enjoining and restraining the violations hereinabove alleged is authorized by section 1007 of the Act, upon application of this plaintiff.

Wherefore, the plaintiff demands judgment as follows:

(a) That the defendant and its officers, agents, employees and representatives and each of them be enjoined during the pendency of this action and permanently:

(1) From engaging in air transportation in violation of section 401(a) of the Civil Aeronautics Act of 1938, as amended; and

(2) From transporting on its flights any person for [4] compensation or hire whose transportation originates or terminates at a place outside of the State of California.

(b) That the plaintiff be granted such other and further relief as the Court may deem necessary and appropriate.

/s/ STANLEY N. BARNES,
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LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ and
ANDREW J. WEISZ,
Assistants U. S. Attorney;

By /s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ JAMES E. KILDAY,
/s/ ALBERT PARKER,
Special Assistants to the
Attorney General;

/s/ JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics Board, Attorneys for the Plaintiff.

Duly verified.

[Endorsed]: Filed May 6, 1954. [5]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT
FOR INJUNCTION

Answering Plaintiff's Complaint on File Herein,
the Defendant, California Central Airlines, Incorporated, Admits, Denies, Alleges, and Moves
as Follows:

I.

Answering paragraph 2 of plaintiff's Complaint, defendant admits that plaintiff, Civil Aeronautics Board, is a regulatory agency created by the Civil Aeronautics Act of 1938, having powers and duties pertaining to the economic regulation of interstate air carriers as distinguished from the Civil Aeronautics Administration likewise created by said Act and having powers and duties pertaining to safety regulations under said Act. Defendant admits, therefore, the status and authority of plaintiff insofar as the same relates to air transportation (as distinguished from air commerce) as defined in the Civil Aeronautics Act of 1938 as amended, to wit:

"Interstate air transportation," "overseas [7] air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively:

"(a) A place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District

of Columbia; or between places in the same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia:

“(b) A place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

“(c) A place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.”

II.

Answering paragraph 4 of plaintiff's Complaint defendant admits the allegations thereof and alleges that the defendant is not an “air carrier” as defined in the Civil Aeronautics Act.

III.

Defendant denies the allegations of paragraph 7 of plaintiff's Complaint insofar as said paragraph alleges that “a substantial number of persons the origination or destination of whose journeys [8] have been places outside the State of California” have been transported by defendant, and alleges that the number of such passengers have not been unsubstantial, but have been negligible compared to

the total number of passengers transported on defendant's lines.

IV.

Defendant denies each and every allegation contained in paragraph 8 of plaintiff's Complaint.

V.

Defendant denies each and every allegation of paragraph 9 of plaintiff's Complaint.

VI.

Denies each and every allegation of paragraph 10 of plaintiff's Complaint.

For a Separate and Affirmative Defense to Plaintiff's Complaint, Defendant Alleges that said Complaint fails to state a claim against defendant upon which relief can be granted.

Wherefore, defendant prays that the Complaint filed herein be dismissed; that the injunction prayed for in said Complaint be denied, and that defendant have such other and further relief as to this Court seems just and proper in the premises.

PERRY H. TAFT and
ALFRED C. ACKERSON,

By /s/ ALFRED C. ACKERSON,
Attorneys for Defendant.

Duly verified.

[Endorsed]: Filed July 13, 1954. [9]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon the annexed affidavits of John F. Wright, Franklin Oelschlager, Joseph W. Stout, Jr., Robert F. Rickey and John W. Chambers, and upon the verified complaint filed herein it is hereby:

Ordered, that the defendant in the above-entitled action, California Central Airlines, Incorporated, appear on the 17th day of May, 1954, at 10 o'clock a.m. of that day, or as soon thereafter as counsel may be heard, at Room 5, United States Courthouse and Post Office Building, Temple and Spring Streets, in the City of Los Angeles, California, and show cause why an injunction during the pendency of this action should not be issued as prayed for in the said complaint.

It Is Further Ordered:

That the service of a copy of the Order to Show Cause and annexed [11] affidavits, together with a copy of the aforesaid complaint of the Civil Aeronautics Board upon the defendant be made on or before the 10th day of May, 1954, and that such service be deemed sufficient service hereof.

Dated: Los Angeles, California, May 6, 1954.

/s/ HARRY C. WESTOVER,

United States District Judge.

[Endorsed]: Filed May 6, 1954. [12]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

John F. Wright, being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as a Compliance Attorney.

2. This is an action seeking an injunction restraining the defendant from violating section 401(a) of the Civil Aeronautics Act of 1938, as amended.

3. Jurisdiction to entertain this action is conferred upon this court by section 1007(a) of said Act.

4. The complaint charges that the defendant has engaged, and is engaging, in air transportation of persons without authority from the [13] Civil Aeronautics Board and thereby, is violating section 401(a) of the Act.

5. The verified complaint and affidavits submitted herewith show that despite the fact that the defendant has no such authority therefor, it has been and is regularly engaged in the carriage for compensation or hire of interstate passengers traveling both east and west transcontinentally by carrying such persons on its flights between Burbank

and San Diego and Oakland and San Francisco, California.

6. The defendant has committed the aforesaid violations for a substantial period of time. Unless promptly restrained, the defendant may be expected, on the basis of its past conduct and operations, to continue the activities complained of, and affiant is informed and believes that defendant intends to continue such activities.

7. In the light of the facts set forth in the complaint, affidavits and exhibits, the public cannot immediately and adequately be protected against the violations complained of except through the interlocutory relief prayed for in said complaint.

8. No previous application for the relief demanded herein has been made.

/s/ JOHN F. WRIGHT.

Subscribed and sworn to before me this 29th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public.

My commission expires: 1-14-58. [14]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

Joseph W. Stout, Jr., being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. On various occasions during the period between September 22, 1953, and the latter part of October, 1953, affiant personally conducted an investigation to ascertain the facts as to the transportation of interstate passengers by California Central Airlines.

3. During the period between September 22, 1953, and October 22, 1953, affiant conducted his investigation of the activities of California Central in Los Angeles and Burbank. His investigation disclosed that various air carriers operating transcontinentally from Burbank, California, were using California Central to provide air transportation between Burbank and San Diego and Oakland for their passengers.

4. On October 1, 1953, affiant visited the offices of U. S. Aircoach at Lockheed Air Terminal, Burbank, and interviewed Mr. Fritz Hutcheson, the President of U. S. Aircoach, with respect to the transfer of U. S. Aircoach interstate passengers to

California Central for onward transportation to San Diego and Oakland.

Mr. Hutcheson stated that the service of California Central is available for U. S. Aircoach and for a long time has been, and is used to San Diego and Oakland for the continuing transportation of passengers who are transported by [15] U. S. Aircoach from points outside of California to Burbank where they are transferred to flights of California Central. He explained that this service was mainly used for passengers destined to San Diego because U. S. Aircoach usually operates its own shuttle flights to Oakland.

Mr. Hutcheson explained that the procedure for transferring the interstate passengers from U. S. Aircoach to California Central at Burbank was as follows: U. S. Aircoach prepares a transfer passenger manifest which lists the names of all passengers to be transferred from each U. S. Aircoach flight to California Central. No invoices are used as U. S. Aircoach always makes payment to California Central on the basis of the transfer manifest which is delivered to the California Central ticket counter. U. S. Aircoach issues a check to California Central in the amount of the total fares for the passengers transferred less a 15% commission plus the federal transportation tax. California Central acknowledges receipt of this payment by a written receipt which is given to U. S. Aircoach. Colonel Sherman, the president of California Central, with whom he had negotiated the arrangement, insisted

that U. S. Aircoach pay this tax on the continuing transportation, even though the passengers have paid the tax on the transportation from their origin outside of California through to their final destination in California so that there is a duplication of the tax payment on the portion of the transportation performed by California Central. Mr. Hutcheson explained that U. S. Aircoach files an application with Internal Revenue Service for reimbursement of the duplicated tax paid on the continuing transportation provided by California Central.

Affiant examined the records of U. S. Aircoach at Burbank on October 1, 1953. These showed that this air carrier has during the past two years been delivering interstate passengers to California Central for continuing transportation from Burbank. Photostatic copies of documents with respect to two representative flights involving transfers of interstate passengers at Burbank from U. S. Aircoach to California Central are attached hereto as Exhibits 1 and 2.

The documents comprising Exhibit 1 establish that 2 passengers who were flown from Burbank to San Diego on California Central flight 534 on September 4, 1953, were transported to Burbank from various points outside of California on [16] U. S. Aircoach flight 903W. Thus Exhibits 1(a) and 1(b) are passenger manifests of U. S. Aircoach flight 903W showing that passengers Hamilton and Wolz were transported on this flight from Philadelphia, Pa., and Chicago, Ill., respectively, depart-

ing these cities on September 3, 1953. Copies of the tickets of these two passengers are also included in Exhibits 1(a) and 1(b) and show that Messrs. Hamilton and Wolz were issued tickets covering their transportation from their points of origin on U. S. Aircoach flight 903W to San Diego, their final destination. Upon arrival of U. S. Aircoach flight 903W at Burbank, these two passengers were transferred to California Central flight 534 for their continuing transportation to San Diego as shown by Exhibit 1(c) which includes a copy of the transfer manifest of U. S. Aircoach and the receipt of California Central acknowledging payment by U. S. Aircoach of the fares of the two transferred passengers from Burbank to San Diego. A notation at the bottom of the receipt shows that U. S. Aircoach made payment to California Central for the transportation of these two passengers by Check Number 2686 on September 4, 1953.

Exhibit 2 is a copy of a transfer manifest of U. S. Aircoach which shows that on September 12, 1953, this air carrier transferred three interstate passengers to California Central at Burbank for continuing transportation to San Diego. This manifest shows that the three passengers had been transported to Burbank from Chicago, Ill., on U. S. Aircoach flight 911W. A note on the manifest shows that the cost of the continuing transportation on California Central was approved by one W. C. Winget with the entry "16.89 OK-to CCA." Included in Exhibit 2 is a copy of a receipt given U. S.

Aircoach by California Central in acknowledgement of receipt of the payment for the continuing transportation for the 3 passengers from Burbank to San Diego. An entry at the top of this receipt shows that U. S. Aircoach made this payment by Check Number 2708 on September 12, 1953.

5. Affiant also visited the Skycoach ticket counter at Lockheed Air Terminal, Burbank, California, on October 1, 1953, where he interviewed Mr. R. F. Coleman, the employee on duty, regarding the arrangements for handling continuing transportation of passengers arriving Burbank from points outside of California on Currey Air Transport, Ltd., Great Lakes Airlines, Inc., and Monarch Air Service. Mr. Coleman stated that the San Diego passengers are [17] transferred at Burbank to flights of California Central or Pacific Southwest Airlines. He explained that Currey, Great Lakes, and Monarch usually operate through to Oakland and the Oakland passengers continue on the same transcontinental flight from Burbank except when aircraft are not available or the passenger load is not sufficient to warrant the operation of the flights beyond Burbank. On these exceptional occasions, the Oakland passengers are transferred to flights of California Central or Pacific Southwest for the continuing transportation. Mr. Coleman stated that Skycoach prepares transfer manifests listing the names of the passengers transferred from the Currey, Great Lakes, and Monarch flights to California Central and Pacific Southwest.

Affiant examined the cash disbursement ledger of Currey Air Transport, Ltd., in Los Angeles, California, on October, 1953. This showed that Currey has made payments to California Central for the carriage of interstate passengers transferred from Currey flights to California Central at Burbank. Photostatic copies of several representative payments to California Central for the carriage of such interstate passengers are attached hereto as Exhibits 3 and 4.

Exhibit 3 (2 pages) is a copy of Currey's Cash Disbursement Ledger for June, 1953. This shows that on June 1, 1953, Currey issued Check Number 1454 in the amount of \$244.60 to California Central for continuing transportation of several interstate passengers.

Exhibit 4 (2 pages) is a copy of Currey's Cash Disbursement Ledger for August, 1953. This shows that on August 3, 1953, Currey issued Check Number 1558 to California Central in the amount of \$96.87 and made another disbursement to California Central by Check Number 1597 on August 28, 1953, in the amount of \$22.52. These checks were in payment for continuing transportation provided for Currey passengers transferred to California Central at Burbank.

6. On October 1, 1953, affiant also visited the ticket counter of North American Airlines at Lockheed Air Terminal, Burbank, and interviewed Mr. Jack Wootton, the agent on duty, with respect to

the transfer of interstate passengers by North American to California Central.

Mr. Wootton stated that North American operates its own shuttle flights between Burbank and Oakland and Burbank and San Diego if aircraft are available [18] and there is a sufficient passenger load; otherwise, the Oakland and San Diego passengers are transferred to either California Central or Pacific Southwest Airlines.

The procedure for transferring interstate passengers from North American to California Central as explained by Mr. Wootton, is as follows: Since about June of 1953, North American usually has two inbound flights arriving in Burbank at about 9 a.m. These are flight 600, which arrives from New York via Dallas, and flight 201, which arrives from New York via Chicago. North American, in advance of the flight arrivals, prepares an Operation Advisory Sheet, Form M 9. This shows what provisions are to be made for passengers continuing from Burbank to other points in California. If North American has a sufficient passenger load and aircraft are available, the San Diego and Oakland flights will be shown together with the NC numbers of the aircraft scheduled for the operation of these flights. If the continuing flights are not to be operated by North American, the Advisory Sheet will note that the continuing passengers are to be off-spaced. In that event, Mr. Wootton checks with both California Central Airlines and Pacific Southwest Airlines to see what flights they

have available and to determine whether they have sufficient space to accommodate the continuing North American passengers. If the flight and space are available, Mr. Wootton then blocks off a number of seats equivalent to the number of continuing passengers on whichever carrier can accommodate them. Usually the North American stewardess prepares the transfer manifest for the passengers on her flight prior to arrival in Burbank. However, sometimes this manifest is not made up by the stewardess and Mr. Wootton then prepares it after the arrival of the flight. When passengers check in at the North American ticket counter, Mr. Wootton examines the passengers' incoming flight tickets. If the ticket is for a one-way trip, Mr. Wootton validates the passenger receipt coupon with a North American stamp, returns this to the passenger, and instructs him to check in at the California Central or Pacific Southwest ticket counter. If the passenger holds a round trip ticket which contains a return flight coupon, Mr. Wootton prepares a North American exchange order which is given to the passenger. The passenger then checks with California Central or Pacific Southwest, as the case may be, [19] and submits the validated passenger receipt or exchange order covering his continuing transportation in California.

Affiant observed flights of North American Airlines and California Central on October 1, 1953, when 8 interstate passengers were transferred from North American to California Central for continu-

ing transportation to San Diego. North American flights 201 and 600 arrived Burbank at approximately 10:00 a.m. with a total of 8 passengers destined to San Diego, 5 from flight 201 and 3 from flight 600. The San Diego passengers reported to the ticket counter of North American Airlines in the Lockheed Air Terminal, where they checked in with Mr. Jack Wootton, the agent on duty. Affiant observed Mr. Wootton prepared two transfer manifests, one listing the name of the San Diego passengers from flight 201 and the other listing the names of the San Diego passengers from flight 600. The passenger addresses, the number of bags, and the baggage weight were also listed on these transfer manifests. Mr. Wootton stated to affiant that the baggage had been checked through to San Diego at the points of origin of these passengers and was transferred from the North American aircraft to the California Central aircraft for the continuing trip to San Diego. He explained that the baggage was not rechecked for the flight on California Central. As the passengers checked in, Mr. Wootton asked for their tickets. The tickets of passengers holding one-way tickets were validated. As Mr. Wootton returned these to the passengers he instructed them to check in at the California Central ticket counter on the other side of the lobby and present their tickets for the flight to San Diego. Mr. Wootton made up North American exchange orders for the passengers holding round trip tickets with return flight coupons. As he returned the round-trip tickets to the passengers, he gave them

these exchange orders and instructed the passengers to check in at the California Central ticket counter and present them for their flight to San Diego. Mr. Wootton explained to affiant that it was necessary to issue these exchange orders for continuing transportation on California Central to the passengers holding round-trip tickets as the return trip flight coupons would be needed by the passenger for return passage and could not be submitted to California Central. He said North American Airlines has a credit arrangement with California Central so that it is not [20] necessary for him to make any cash payment for the continuing transportation. Mr. Wootton explained that California Central picks up the passenger receipt coupon of the one-way tickets and the exchange orders as the passengers check in and use these along with the transfer manifests to support their later billing to North American for the transferred passengers carried.

Affiant observed the passengers report to the California Central ticket counter after leaving the North American ticket counter. At the California Central counter, they checked in with Mr. E. Evans, agent on duty, for their continuing trip to San Diego. Mr. Evans picked up their one-way tickets and exchange orders. He removed the passenger receipt coupon from the one-way tickets and returned the ticket folder to these passengers. Affiant observed that Mr. Evans gave gate passes to the passengers as he instructed them that they would be flying on California Central flight 534 to San Diego. Affiant observed that Mr. Evans made up

California Central tickets for each passenger received from North American for the trip from Burbank to San Diego. These California Central tickets were neither shown to or submitted to the transfer passengers.

Affiant interviewed Pfc. Ronald A. Robbins, Serial 1388883, B Battery, First AAA, AW Battalion, Camp Pendelton, California, one of the passengers, who stated that he had arrived in Burbank on October 1, 1953, from Washington, D. C., on North American Airlines flight 600. Pfc. Robbins stated that he was instructed to report to the ticket counter of California Central after he had checked at the North American Airlines ticket counter. He explained that his ticket had been stamped at the North American Airlines ticket counter. Pfc. Robbins stated that when he checked in at the California Central ticket counter, the agent picked up his ticket, removed a coupon and returned the back of the folder to him, along with a California Central gate pass as his authorization to board California Central flight 534 to San Diego. Affiant observed that the number of the North American ticket was OW-1, 33643. Pfc. Robbins stated that he had purchased his ticket in Washington, D. C., from North American Airlines for his trip from Washington to San Diego and had paid a total fare of \$111.55. Pfc. Robbins advised that he had paid no additional fare at Burbank for his transportation from Burbank to San Diego. He submitted for affiant's

inspection the folder of his [21] North American ticket, the California Central gate pass, and his baggage check. Affiant observed that the baggage claim check held by Pfc. Robbins was issued by North American Airlines and bore the Number C-54500. It covered the check of his baggage from Washington, D. C., to San Diego. Pfc. Robbins stated that California Central had made no inquiry of him as to whether he was continuing his trip from a point outside of the State of California. Pfc. Robbins stated that when the California Central agent asked for his address, he had given this as Bennington, N. H.

After observing Pfc. Robbins and the other passengers board California Central flight 534 which departed Burbank at approximately 11 a.m. on October 1, 1953, affiant proceeded to the ticket counter of California Central where he submitted his CAB credentials to Mr. Evans and later to Mr. U. D. McDonald, Southern Region Manager of California Central. A request was made to these persons for permission to inspect the records of flight 534, including the transfer manifests and documents picked up from the passengers transferred from flights of North American Airlines. Mr. Evans stated that these documents had been returned to North American Airlines. Mr. McDonald would not permit affiant to make a copy of the California Central flight 534 passenger manifest. Upon further request, he made available the California Central tickets for affiant's examination.

Affiant observed that California Central ticket B47916 was issued for Pfc. Robbins, and was validated as follows: "CCA October 1, 1953, Burbank."

7. Affiant examined the records of North American for August, September, and October, 1953, in the executive offices of North American Airlines at Burbank during October, 1953, and found numerous instances of westbound transcontinental flights involving transfers of passengers at Burbank from the North American carriers to California Central for onward transportation to San Diego and Oakland. Affiant made photostatic copies of the documents with respect to several representative flights. These documents are attached hereto as Exhibits 5 through 14. Each of these Exhibits consists of (1) the passenger manifests of the North American flight on which the passengers were transported from points outside the State of California to Burbank, (2) the passenger coupons of tickets purchased by passengers for their flights from such points outside the State of California to [22] their ultimate destination in the State of California, (3) the transfer manifest for the continuing transportation on California Central of the passengers from Burbank to their final destination in California, (4) the North American exchange orders issued to California Central to provide the continuing transportation of passengers holding round-trip tickets, and (5) the "Request for Check" form showing the check issued to California Central in payment for the continuing transportation.

For example, the documents on the transfer of the 8 interstate passengers from North American to California Central which was observed by affiant on October 1, 1953, at Burbank are attached hereto as Exhibit 5. Thus, Exhibit 5(a) is a passenger manifest showing that passengers Mr. and Mrs. Orth were transported from New York to Burbank on North American flight 600, which departed New York (La Guardia Airport) on September 30, 1953. Exhibit 5(b) is a passenger manifest showing that passenger Robbins was transported from Washington, D. C., to Burbank on North American flight 600 which departed Washington the same day. Exhibit 5(c) is a passenger manifest showing that passengers Lane and Winus were transported from Chicago to Burbank on North American flight 201 which departed Chicago on September 30, 1953. Exhibit 5(d) is a passenger manifest showing that passengers Herzue, Hixon, and Nolan, were transported from Kansas City, Mo., to Burbank on North American flight 201 which departed Kansas City on October 1, 1953. Upon arrival of North American flights 600 and 201 in Burbank on October 1, 1953, these 8 passengers were transferred to California Central flight 534 for continuing transportation to their final destination, San Diego. Copies of the transfer manifest from North American flights 600 and 201 to California Central are attached hereto as Exhibits 5(e) and 5(f), respectively. Also included in Exhibits 5(e) and 5(f) are copies of the passenger coupon of the interstate passengers who held one-way North American

tickets and exchange orders for the passengers who had round-trip tickets which were needed for return-trip transportation and could not be submitted to California Central. The passenger coupons show that the passengers were issued tickets covering their transportation from their points of origin on North American to San Diego, their final destination. The manifests, passenger coupons, and exchange orders in Exhibits [23] 5(e) and 5(f) were picked up by California Central on October 1, 1953, when the passengers transferred from North American flights 201 and 600. The documents were later submitted to North American by California Central in support of the billing for the continuing transportation provided by California Central, and were attached to the document "Request for Check" which is submitted as Exhibit 5(g). This shows that Check 8776 was issued on October 2, 1953, to California Central in payment for the transportation of 8 passengers from Burbank to San Diego. This payment is shown on the Ledger Account with California Central Airlines which is attached as Exhibit 5(h). The disbursement was described as "Reference 2108." Numerous other disbursements charged to this same reference were made for the period included on Exhibit 5(h) from August 20, 1953, to October 8, 1953. Affiant determined that it was not practical to secure copies of all documents pertaining to the transfer of interstate passengers to California Central as shown by these disbursement entries because of the large volume of photocopies that would be involved. Documents

for a few representative flights were obtained and are attached hereto as the following Exhibits:

Exhibit 6 includes passengers' manifests of North American flights 600 and 201 which show the names of passengers who arrived in Burbank on September 24, 1953, from points outside of California. Copies of the passenger coupons show that the tickets issued to these passengers covered transportation from the points outside of California to the final destination, San Diego. Upon arrival in Burbank, 12 of the passengers were transferred to a flight of California Central as shown by the transfer manifest. The "Request for Check" shows that California Central was paid for the continuing transportation.

Exhibit 7 includes the passenger manifests of North American flight 203 which show the names of passengers who departed New York and Detroit for Burbank on this flight on September 13, 1953. Upon arrival in Burbank on September 14, 1953, the San Diego passengers were transferred to a flight of California Central for their continuing transportation. Copies of the passenger coupons of these transfer passengers show that their tickets were issued by North American from origins outside of California to San Diego. A copy of the transfer manifest from North American to California Central show that the passengers were carried by [24] California Central from Burbank to San Diego. The "Request for Check" shows that California Central was paid for this transportation.

Exhibit 8 consists of the passenger manifests of North American flights 600 and 201 which arrived Burbank on September 10, 1953, from points east of California and include the names of 7 passengers destined to San Diego. Copies of the transfer manifest show that these 7 passengers were transferred to a flight of California Central on September 10, 1953, for continuing transportation from Burbank to San Diego. The passenger coupons of these passengers show that their tickets were issued by North American for transportation from their origins to San Diego and the "Request for Check" shows that California Central was paid for the continuing transportation from Burbank for the 7 San Diego passengers.

Exhibit 9 includes passenger manifests of North American flight 203 which arrived Burbank on September 4, 1953, and points east of California and show the names of 5 passengers destined to San Diego. The exchange orders and invoice from California Central show that these 5 passengers were transported from Burbank to San Diego on a flight of California Central on September 4, 1953. A copy of the "Request for Check" shows that this continuing transportation from Burbank was paid to California Central.

Exhibit 10 consists of passengers' manifests of North American flights 201 and 600 which departed from Chicago and Dallas, respectively, on September 3, 1953, and show the names of 6 passengers

destined to San Diego. The transfer manifest of North American to California Central on September 3, 1953, includes the names of these 6 passengers, showing that California Central provided continuing transportation from Burbank to San Diego. A copy of the "Request for Check" shows that the disbursement made by Check 8570 was in payment of the continuing transportation for 14 San Diego passengers, which included the 6 passengers on September 3, 1953, and 8 passengers on September 4, 1953, who were listed on the manifests described in Exhibit 11.

Exhibit 11 consists of passenger manifests of North American flight 600 which arrived Burbank on September 4, 1953, and includes the names of 8 passengers destined to San Diego. These 8 passengers are listed on the transfer manifest to California Central showing that California Central provided the continuing [25] transportation from Burbank to San Diego on September 4, 1953. Payment of this continuing transportation to California Central is in the disbursement described in the "Request for Check" in Exhibit 10.

Exhibit 12 is a copy of manifest of North American flight 600 which shows the names of 3 passengers who were transported on this flight to Burbank, departing Dallas on August 29, 1953. An entry on the manifest shows that the passengers were transferred to California Central for continuing transportation to Oakland.

Exhibit 13 includes a copy of a passenger mani-

fest of Twentieth Century Airlines dated August 29, 1953, and captioned "Passengers Given to Other Carriers." Entry on this document shows that 5 passengers were transferred at Burbank to California Central for continuing transportation to San Diego. The names of the passengers are listed on the transfer manifest which notes that they were transferred from flight 600 on August 29, 1953. Passenger coupons of the passengers show that they were issued North American tickets from points outside of California to San Diego. The "Request for Check" shows that payment on the continuing transportation for the 5 passengers was made to California Central by check No. 8487 on August 29, 1953.

Exhibit 14 consists of a passenger manifest of North American flight 201 which departed Chicago on August 28 and arrived Burbank on August 29, 1953. The names of 14 of the San Diego passengers who originated in Chicago listed on this manifest are shown on the passenger manifest of California Central for flight 556 from Burbank to San Diego on August 29, 1953. Copies of North American tickets show that these covered transportation from the point of origin outside of California to San Diego. A transfer manifest of Twentieth Century Airlines shows that 14 passengers were transferred to California Central for transportation to San Diego and the manifest is dated by the stamp for August 29, 1953. A copy of the "Request for Check" shows that payment for the continuing transportation of

the 14 passengers to San Diego on August 29, 1953, was made to California Central.

/s/ JOSEPH W. STOUT, JR. [26]

Subscribed and sworn to before me this 28th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, D. C.

My commission expires 1/14/58. [27]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

Robert F. Rickey, being first duly sworn, deposes and says that:

1. He is, and was at all times herein mentioned, employed by the Civil Aeronautics Board as an Air Transport Examiner.

2. Investigation by affiant of a number of California Central Airlines, Inc. (California Central), flights arriving at Lockheed Air Terminal, Burbank, from San Diego during November and December, 1953, disclosed that California Central is available to, and is used by San Diego ticket agents to connect their San Diego passengers with the eastbound transcontinental flights of Large Irregular Carriers

operating from Lockheed Air Terminal. The California Central flight most generally used is flight 579 arriving at Burbank from San Diego at approximately 7:45 p.m. For the most part, the transcontinental passengers travelling on California Central from San Diego to Burbank are transferred at Burbank to the so-called North American carriers, consisting of Hemisphere Air Transport, Trans American Airways, Trans National Airlines, Inc.; Twentieth Century Airlines, Inc., and The Unit Export Company, Inc.; and the Skycoach carriers, consisting of Currey Air Transport, Ltd., and Great Lakes Airlines, Inc. Some of such passengers, however, are routed via other Large Irregular Carriers represented by the American Air Bus Agency including U. S. Aircoach, Peninsular Air Transport, Aero Finance Corporation, Air Services, Inc., and Caribbean American Lines, Inc. On every arrival of flight 579 observed by affiant, there was at least one passenger and usually several who, after claiming their luggage, checked in for the eastbound transcontinental flights on one [84] of the Large Irregular Carriers. The following are representative flights.

a. On November 30, 1953, 2 of the 4 passengers deplaning from flight 579 at Burbank were interviewed. Machinists Mate 2nd Class (MM2) J. C. Garner, U.S.N., Route 2, Box 210, Newport, North Carolina, had been issued CCA ticket No. B 43910 for San Diego-Burbank transportation in conjunction with North American ticket No. OW-146376 validated "NAA Nov. 28 S.D." by North Ameri-

can's San Diego ticket office and made out for flight 101 of November 30 to New York. Although flight 101 originates at Burbank, the North American ticket showed the routing as San Diego to New York. Fare was indicated as \$99.00 plus \$14.85 tax or a total of \$113.85. In this instance, North American absorbed the cost of the California Central ticket (\$6.38) since it was not added to the \$113.85 cost of the North American ticket. In fact, \$113.85 is North American's established tariff (including tax) from San Diego to New York. Baggage tag No. 4358 was attached to Garner's bag when he checked in with California Central at San Diego.

b. On December 1, 1953, both the North American and the Skycoach transcontinental flights were delayed in leaving Burbank. The reason for this delay, as explained by North American agents James Hart and Edward MacAndrews was that California Central Airlines, scheduled to shuttle connecting passengers from Oakland for the Burbank flights, had a mechanical failure at Oakland and another aircraft had to be dispatched from Burbank to pick up these passengers and bring them to Burbank. This flight had 25 connecting passengers for North American and 17 for Skycoach.

c. At 12:10 a.m. on December 2, 1953, California Central's Martin 202 aircraft N93052 arrived from Oakland. All passengers deplaning apparently were connecting passengers for either the North American or Skycoach flights and were sent directly to the waiting DC-4's without further check-in. Their bag-

gage was transferred directly from the California Central aircraft to the North American and Skycoach aircraft.

d. On December 9, 1953, 9 passengers from a total of 11 leaving California Central flight 579 at Burbank checked in at the North American, Skycoach, and American Air Bus counters after first claiming their luggage which was checked [85] only to Burbank by California Central.

e. On December 10, 1953, at 7:10 a.m., Skycoach (Great Lakes Airlines, Inc.) flight 912 arrived at Lockheed Air Terminal, Burbank, from New York and intermediate cities. Three passengers continuing on to San Diego were sent by the Skycoach counter agent to the California Central ticket counter with a slip of white paper which listed the three names. The California Central agent took the paper and advised them to first claim their luggage in front of the terminal and then return to the counter for check-in. He then issued California Central Burbank-San Diego tickets to these passengers.

Seaman R. Linn (U. S. Navy), 511 Avenue I, Coronado, California, one of these three San Diego passengers, was interviewed while he was waiting for the California Central flight. He held Skycoach ticket RT7700 which showed a routing of New York to San Diego and San Diego to New York. Fare shown was \$160.00 plus \$24.00 Federal Tax or a total of \$184.00. It was made out for flight 912 of December 9 which is the flight actually used. Printed

on the ticket was "Great Lakes Airlines, Inc., Lockheed Air Terminal, Burbank, California," and in the "sub-agent" space was the notation, "Central 10037." Seaman Linn explained that his original ticket (actually exchange order No. 10037) had been purchased at Westover Air Force Base, Springfield, Massachusetts. The Skycoach ticket RT7700 for which this was exchanged at La Guardia Field, New York, was validated "Skycoach Airlines Agency of N. Y., Inc., Dec. 9, '53, Marine Terminal, LAG." The ticket was in a white jacket bearing the printed message, "Always Fly Skycoach."

At the California Central counter he was issued California Central ticket No. B-50568 for flight 324 on December 10 from Burbank to San Diego. The ticket was printed to show a fare of \$5.55 plus 83c tax or a total of \$6.38 but Linn said no additional collection was made from him at either the Skycoach or California Central counters so presumably the cost of the ticket was absorbed by Skycoach or Great Lakes. The California Central ticket was stapled inside a folder along with the baggage claim check and a California Central gate pass was issued to Linn marked "Flt. 324, Mfst. No. 4."

3. On December 2, 1953, an inspection was made of tickets for North [86] American's flight 101 of the previous evening. This check was made in the offices of Republic Air Coach System, the financial and accounting unit of the North American combine, in Building No. 11, Lockheed Air Terminal, Burbank. During this check, it was noted that on many

of the North American tickets issued in San Diego, there was a California Central or Pacific Southwest Airlines (another California intrastate carrier) ticket number written in the "Conjunction Ticket" box of the North American ticket. Following is information on 2 such tickets against which California Central conjunction tickets were issued.

North American ticket No. OW-146211 was issued to E. Wisolowski, 1858 South 36th St., Milwaukee, Wisconsin, for transportation from San Diego to Chicago on North American flight 101 of December 1, 1953, for \$75.00 plus \$11.25 tax or a total of \$86.25. The ticket was validated "Nov. 28, '53 S.D." by North American's San Diego ticket office. Written in the conjunction ticket space was "CCA XO-3898." This means that San Diego-Burbank transportation was furnished by California Central to connect with NAA at Burbank. Apparently no extra charge was made here for the California Central ticket over and above the regular \$75.00 North American tariff.

North American ticket No. OW-146212 was issued to R. M. Reid, 454 Neisel Avenue, Springfield, New Jersey, and showed a routing of San Diego to New York on North American flight 500 for December 1 (this flight was consolidated with flight 101 on Dec. 1). Fare shown on the ticket was \$99.00 plus \$14.85 tax or a total of \$113.85. It was validated "Dec. 1, '53 S.D." by agent "B.J.L." in North American's San Diego office. On the ticket is noted "CCA 2625" which is the conjunction ticket

issued for San Diego-Burbank transportation via California Central.

4. During a later check of North American tickets in Republic's office on December 14, 1953, similar examples were obtained from North American flight coupons lifted for flight 101 of the previous evening, Dec. 13, 1953. These were photographed and are Exhibits 3 and 4 of this report. Cross-references to California Central tickets in the "Conjunction Ticket" space are indicated by the letters [87] CCA.

5. On March 9, 1954, affiant again arrived in Los Angeles, California, from Las Vegas, Nevada. The purpose of the trip at that time was to determine whether California Central would accept an interstate passenger for transportation.

Affiant arrived at Los Angeles International Airport via Western Airlines flight 31 which arrived Los Angeles at 6:25 p.m., on that date. Affiant's ticket was American Airlines stock No. O13B-25173.

Upon arrival affiant went to the California Central ticket counter at Los Angeles International Airport and inquired of California Central Agent Edward Winslow, who was on duty, about the next flight to San Francisco. Winslow advised affiant that there would be a California Central Martinliner leaving at 7:25 p.m., but it was a first-class flight costing \$15.53 rather than the lower DC-3 fare of \$13.46.

Affiant during the conversation had the Western Airlines ticket envelope in his hand and twice told

Agent Winslow that affiant had just arrived from Las Vegas on Western, describing the flight as being a little bumpy. Agent Winslow's only comment was if affiant's ticket was made out to San Francisco, California Central could not accept it for passage but affiant could have it refunded by Western and then purchase a California Central ticket with the refund. Affiant advised him he would obtain the refund later.

Affiant thereupon purchased California Central ticket No. A215729 at a cost of \$15.53, being \$13.50 fare plus \$2.03 tax. The ticket was made out for flight 579 on March 9, 1954, from Los Angeles to San Francisco. The major portion was detached and retained by Agent Winslow but the passenger receipt portion was stapled inside a California Central folder which was handed to affiant. This ticket folder is attached hereto as Exhibit 5.

Because of weather conditions affiant was transported by automobile from Los Angeles International Airport to Lockheed Air Terminal at Burbank. Upon arrival there, affiant and other passengers boarded California Central flight 579, which arrived in San Francisco at 10:10 p.m. the same evening.

[Seal] /s/ ROBERT F. RICKEY.

Subscribed and sworn to before me this 26th day of April, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, D. C.

My Commission expires 1/14/58. [88]

[Title of District Court and Cause.]

AFFIDAVIT

City of Washington,
District of Columbia—ss.

Mrs. James E. Cook, being first duly sworn, deposes and says that:

1. She resides at 1225 Savannah Street S. E., Washington, D. C.

2. On or about Tuesday, December 8, 1953, while visiting at 1450 E. Washington Street, San Diego, California, she phoned the number listed in the then effective San Diego phone directory as that of Air America, for the purpose of making reservations for herself and her two-year-old daughter, and her infant son to fly to Washington, D. C.

3. She did in fact make such reservations on a flight, which according to the reservations agent was to depart San Diego at 7 p.m. on December 11, 1953, and arrive in Washington, D. C., at 2:30 p.m. EST, on December 12, 1953.

4. On Friday, December 11, 1953, tickets were delivered to her at the address stated in paragraph 2 above, for which she gave the messenger a check in the amount of \$154.39. The ticket envelope contained California Central gate passes for herself and for her daughter, Miss Ardis Cook, and the document attached as Exhibit #1 was the Gate pass for her daughter.

5. Inside each gate pass was stapled a ticket for

transportation on California Central Airlines from San Diego to Burbank, California, and a North Star Aircoach ticket for transportation from Burbank to Washington, D. C. [121]

6. On December 11, 1953, she and her two children appeared at the California Central Airlines counter at Lindbergh Field, San Diego, at approximately 6:30 p.m. PST, presented their tickets to the agent on duty, who removed the California Central Airlines tickets from the gate pass, and they did in fact fly from San Diego to Burbank, California, on a California Central Airlines plane that was scheduled to depart from San Diego at 7 p.m. PST, but which did in fact depart at approximately 7:30 p.m.

7. Immediately upon arrival at Burbank, she checked in at the Caribbean American counter, as directed in the California Central gate pass attached as Exhibit 1, for flight 1211E which was to depart for Washington, D. C., at 9:30 p.m. PST, December 11, 1953. Due to protracted delays of such flight, she cancelled her reservations on Caribbean American Airlines and subsequently flew to Washington on American Airlines.

/s/ MRS. JAMES E. COOK,
(Muriel Cook.)

Sworn to before me this 8th day of March, 1954.

[Seal] /s/ LOUISE S. MYERS,
Notary Public, D. C.

My Commission expires: 1/14/58. [122]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT
ON THE PLEADINGS

Please Take Notice that the undersigned will bring the attached Motion on for hearing before the above-entitled Court at Room 5, United States Courts and Post Office Building, Los Angeles, California, on the 19th day of July, 1954, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Said Motion will be based upon plaintiff's Complaint and defendant's Answer thereto, the Points and Authorities filed in these proceedings, and will be made pursuant to Rule 12 of the Federal Rules of Civil Procedure.

Dated: July 12, 1954.

PERRY H. TAFT, and

ALFRED C. ACKERSON,

By /s/ ALFRED C. ACKERSON,

Attorneys for Defendant. [135]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT
ON THE PLEADINGS

Defendant moves the Court to enter judgment on the pleadings in favor of the defendant and to dismiss this cause at the plaintiff's costs for the reason that the plaintiff in its complaint has failed to state a claim against the defendant upon which relief can be granted.

Dated July 12, 1954.

PERRY H. TAFT, and
ALFRED C. ACKERSON,
By /s/ ALFRED C. ACKERSON,
Attorneys for Defendant.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 13, 1954. [136]

[Title of District Court and Cause.]

ORDER

Westover, J:

For the reasons set forth in Memorandum of Opinion re Order to Show Cause in Case #16,754, Civil Aeronautics Board vs. Friedkin Aeronautics, Inc., which Memorandum was filed this date, defendant's motion to dismiss in the above-entitled action is granted.

Dated: September 17, 1954.

[Endorsed]: Filed September 17, 1954. [138]

United States District Court, Southern District
of California, Central Division

Civil No. 16755-HW

CIVIL AERONAUTICS BOARD,

Plaintiff,

vs.

CALIFORNIA CENTRAL AIRLINES, INCOR-
PORATED,

Defendant.

ORDER AND JUDGMENT GRANTING
MOTION TO DISMISS

This cause came on for hearing on the 19th, 22nd, 23rd, and 26th days of July, 1954, on the motion of plaintiff for preliminary injunction and on the motion of defendant to dismiss the Complaint; whereupon, after receiving evidence, both oral and documentary, and after hearing arguments of counsel for the respective parties, and upon due consideration thereof,

It is Hereby Ordered, Adjudged, and Decreed that the motion of plaintiff for a preliminary injunction be and hereby is denied; that the motion of defendant for dismissal of the action be and hereby is granted, and that judgment is hereby rendered dismissing the Complaint.

Dated: September 23rd, 1954.

/s/ HARRY C. WESTOVER,

U. S. District Judge. [139]

Approved as to form:

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

ANDREW J. WEISZ,
Assistant U. S. Attorney;

JAMES E. KILDAY and
ALBERT PARKER,
Special Assistants to the
Attorney General;

JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics
Board;

By /s/ ANDREW J. WEISZ,
Attorneys for Plaintiff.

[Endorsed]: Filed September 23, 1954.

Docketed and entered September 24, 1954. [140]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO UNITED STATES
COURT OF APPEALS UNDER RULE
73 (b)

Notice is hereby given that the Civil Aeronautics Board, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the order and final judgment entered in this action on September 23, 1954, denying plaintiff's motion for a preliminary injunction and granting the motion of defendant for dismissal of the action,

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ DANIEL M. FRIEDMAN,
Special Assistant to the
Attorney General;

JOHN F. WRIGHT,
Attorney, Office of Compliance, Civil Aeronautics
Board, Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1954. [142]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 149, inclusive, contain full, true and correct copies of Complaint; Answer; Order to Show Cause with Affidavits in Support; Affidavit of Edna K. Sherman in Opposition to Temporary Injunction; Motion and Notice of Motion for Judgment on the Pleadings; Order Granting Motion to Dismiss; Order and Judgment Granting Motion to Dismiss; Notice of Appeal; Order Extending Time to File Record and Docket Appeal; Designation of Record on Appeal and Statement of Points on Which Appellant Intends to Rely on Appeal; which, together with the original Plaintiff's Exhibits 1 to 11, inclusive, transmitted herewith; and the Reporter's Transcript of Proceedings held on July 19, 22, 23 and 26, 1954, and Memorandum of Opinion Re Order to Show Cause, which are physically a part of the transcript of record on appeal in the case of *Civil Aeronautics Board v. Friedkin Aeronautics, Inc., etc.*, District Court No. 16,754-HW Civil, a companion case to the one herein, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 7th day of February, 1955.

[Seal] EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14649. United States Court of Appeals for the Ninth Circuit. Civil Aeronautics Board, Appellant, vs. California Central Airlines, Incorporated, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 8, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 14648

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

CALIFORNIA CENTRAL AIRLINES, INCOR-
PORATED,

Appellee.

No. 14649

CIVIL AERONAUTICS BOARD,

Appellant,

vs.

FRIEDKIN AERONAUTICS, INC., Doing Busi-
ness as PACIFIC SOUTHWEST AIRLINES,

Appellee.

STIPULATION RE CONSOLIDATION OF
APPEALS AND ORDER THEREON

Whereas, the above-entitled actions were tried together in the United States District Court for the Southern District of California, Central Division, before the Honorable Harry C. Westover, Judge of said Court, and

Whereas, the said actions present common questions of law, and were decided upon said common questions of law in the Court below, and

Whereas, it appears both expedient and economical that these appeals should be heard and considered together,

It Is Hereby Stipulated by and between the respective parties hereto, through their attorneys, and subject to the approval of the Court, that the said appeals may be heard and considered together and consolidated for the purposes of appeal.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

JAMES E. KILDAY, and
ALBERT PARKER,
Special Assistants to the Attorney General;

JOHN F. WRIGHT,
Acting Chief, Office of Compliance, Civil Aeronautics
Board, Attorneys for Appellant.

MESERVE, MUMPER &
HUGHES,

By /s/ LEWIS T. GARDINER,
Attorneys for Appellee, Fried-
kin Aeronautics, Inc.

QUITTNER & STUTMAN,
PERRY H. TAFT, and
ALFRED C. ACKERSON,

By /s/ ALFRED C. ACKERSON,
Attorneys for Appellee, Cali-
fornia Central Airlines, Inc.

ORDER

Upon consideration of the foregoing stipulation,
and good cause appearing therefor,

It is Ordered that the above-entitled appeals shall
be heard and considered together, and consolidated
for purposes of appeal.

Dated: Feb. 9, 1955.

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WM. HEALY,

/s/ H. T. BONE,

Judges of the United States
Court of Appeals.

[Endorsed]: Filed February 10, 1955.

[Title of Court of Appeals and Cause.]

Nos. 14648 & 14649

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

In accordance with Rule 19(6) of the Rules of Practice of this Court, Appellant states that the points on which it intends to rely on appeal are as follows:

Point I.

The District Court erred in holding that the economic regulatory provisions of the Civil Aeronautics Act have no application to a common carrier by air whose operations of aircraft are confined within the boundaries of a single state.

Point II.

The District Court erred in failing to recognize and to hold upon the basis of the record below that defendants are engaged in unauthorized interstate air transportation within the meaning and in violation of the Civil Aeronautics Act.

Point III.

The District Court abused its discretion in denying the motions below for temporary injunctions.

Point IV.

The District Court erred in dismissing the complaints below.

STANLEY N. BARNES,
Assistant Attorney General;

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ANDREW J. WEISZ,
Assistant U. S. Attorney;

/s/ DANIEL M. FRIEDMAN,
Special Assistant to the At-
torney General;

JOHN F. WRIGHT,
Attorney, Office of Compliance, Civil Aeronautics
Board, Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 16, 1955.

No. 14704 ✓

**United States
Court of Appeals
For the Ninth Circuit.**

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

FILED

JUN 20 1955



No. 14704

**United States
Court of Appeals
For the Ninth Circuit.**

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

And the other side of the coin is that
the world is not a perfect place
and it is not a perfect place

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[Clerk's Note: When deemed likely to be of an important nature. errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SLOANE & FISHER,

1230 Bank of America Bldg.,
San Diego 1, Calif.

ROBERT W. CONYERS,

924 San Diego Trust & Savings Bldg.,
San Diego 1, Calif.

For Appellee:

LAUGHLIN E. WATERS,

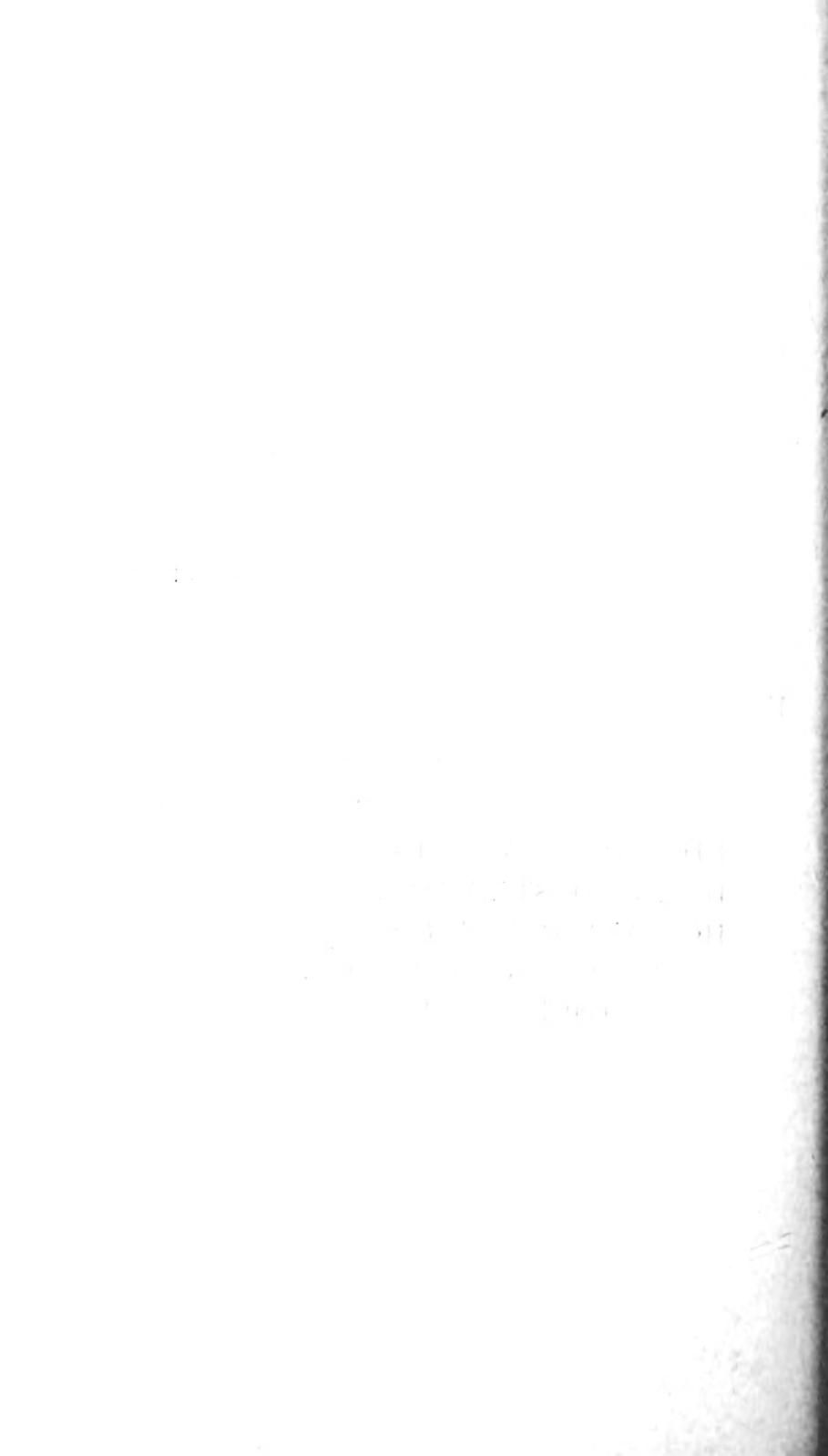
United States Attorney;

EDWARD R. McHALE,

HARRY D. STEWARD,

HOWARD R. HARRIS,

Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.



United States District Court for the Southern
District of California, Southern Division

Civil No. 1691

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

PETITION FOR ORDER OF ATTACHMENT
OF PERSON FOR CIVIL CONTEMPT

(Internal Revenue Code, 1954, Section 7604)

Your petitioner, Lloyd M. Tucker, Special Agent,
Internal Revenue Service, respectfully represents as
follows:

I.

This action arises and jurisdiction is granted this
Court under the provisions of the Internal Revenue
Code of 1954, 68A Stat., Sections 7402, 7602, 7603,
7604, 7605; Federal Rules of Civil Procedure 64,
81 (a)(3); and Title 28 United States Code, Sec-
tions 1340 and 1345.

II.

That petitioner is a duly appointed and acting
Special Agent of the Internal Revenue Service and
has been authorized by the Secretary of the Treas-
ury to perform the duties of such office and, spe-
cifically, the duties referred to in Sections 7603 and
7604 of the Internal Revenue Code, 1954.

III.

That at all times herein mentioned the internal revenue tax liability of Clifford O. Boren and Delta M. Boren was, and is, under inquiry and determination by the Internal Revenue Service; that respondent, Evelyn Hubner, has possession, [2*] care, and custody of certain books, records, papers and data hereinafter set forth; that said books, records, papers and data contain therein entries relating to the business of aforesaid Clifford O. Boren and Delta M. Boren; that said books, records, papers and data are material and relevant to said inquiry.

IV.

That said books, records, papers and data are as follows: Books of account of the partnership known as the Hubner Building Company, relating to transactions had by that partnership with the aforesaid Clifford O. Boren and Delta M. Boren for the years 1950, 1951, and 1952, together with pay checks, invoices, correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

V.

That on November 4, 1954, respondent, Evelyn Hubner, was summoned under the Internal Revenue laws to appear before petitioner at 527 Land Title Building, 235 Broadway, San Diego, California, on November 29, 1954, at 10:00 o'clock a.m. and there to testify and to produce among other documents said books, records, papers, and data; that for that

*Page numbering appearing at foot of page of original Certified Transcript of Record.

purpose a summons dated November 4, 1954, was issued by petitioner directed to respondent, a true and correct copy of which is attached hereto and incorporated herein as though set forth in full.

VI.

That on November 4, 1954, at San Diego, California, said summons was personally served by delivering in hand to respondent an attested copy thereof; that the certificate of the service of said summons appears on the back of said summons; that a true and correct copy of said certificate is attached hereto and incorporated herein as though set forth in full.

VII.

That respondent, Evelyn Hubner, resides in San Diego County within the Southern District of California.

VIII.

That respondent did wilfully and knowingly neglect and refuse to obey said summons as required, in that respondent did appear at the time and place set forth [3] in the summons but did not produce said books, records, papers and data.

Wherefore, your petitioner prays:

1. That an attachment be issued against said Evelyn Hubner as for a contempt directed to the United States Marshal or his deputy for the arrest of said Evelyn Hubner, and that an order be issued therefor; or that, in lieu thereof, said Evelyn Hubner be ordered to show cause, if any there be, why an attachment should not issue against her as for

a contempt and why she should not be compelled to answer petitioner's questions and produce said books, records, papers and data and, further, why she should not be held in civil contempt.

2. That if satisfactory proof be made, and no sufficient showing to the contrary shall appear, that this Court issue an attachment providing for the arrest of said Evelyn Hubner, compel said Evelyn Hubner to answer petitioner's questions and produce said books, records, papers and data, and for failure thereof to hold said Evelyn Hubner in civil contempt.

3. That such further orders be made consistent with the law for punishment of civil contempt to enforce obedience to the requirements of said summons as may be necessary in the circumstances.

4. For such other and further relief as to the Court may seem just and proper.

LAUGHLIN E. WATERS,
United States Attorney;

EDWARD R. McHALE,
Assistant U. S. Attorney,
Chief, Tax Division;

HARRY D. STEWARD and
HOWARD R. HARRIS,
Assistants United States
Attorney;

/s/ HOWARD R. HARRIS,
Attorneys for Petitioner.

Duly verified. [4]

U. S. Treasury Department—Internal
Revenue Service

SUMMONS

In the matter of the tax liability of:

CLIFFORD O. BOREN and
DELTA M. BOREN.

Internal Revenue District of Los Angeles

Period(s):

Years 1950, 1951, and 1952.

The Commissioner of Internal Revenue

To: Evelyn Hubner.

At: San Diego, California.

Greeting:

You are hereby summoned and required to appear before Lloyd M. Tucker, an officer of the Internal Revenue Service, to give testimony relating to the tax liability and/or the collection of the tax liability of the above-named person for the period(s) designated and/or to bring with you and produce for examination the following books, records, and papers at the time and place hereinafter set forth: Books of account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company relating to transactions had by that partnership and corporation with the above-named Clifford O. Boren and Delta M. Boren for the years above stated, together

with paid checks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and the above-named taxpayers.

Place and time for appearance: at 527 Land Title Building, 235 Broadway, San Diego, California, on the 29th day of November, 1954, at 10:00 o'clock a.m.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States Commissioner to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of Section 7602, Internal Revenue Code of 1954 this 5th day of November, 1954.

/s/ LLOYD M. TUCKER,

Special Agent, Internal
Revenue Service. [6]

CERTIFICATE OF SERVICE OF SUMMONS

(Pursuant to Section 7603, Internal Revenue
Code of 1954)

I hereby certify that I served the summons on the reverse hereof.

Date Summons Served: On November 5, 1954.

Time: 11:40 a.m. At: 2676 Ridgeview Dr., San Diego, California.

☒ I handed an attested copy thereof to the person to whom it was directed.

At: 2676 Ridgeview Dr., San Diego, California.

How Summons Was Served (Check One)

☐ I left attested copy thereof with the following person at the last and usual place of abode of the person to whom it is directed.

Name

Address

/s/ LLOYD M. TUCKER,
Special Agent.

Sec. 7603. Service of Summons.—A summons issued under Section 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

[Endorsed]: Filed December 14, 1954. [7]

fully in her sole possession, and no other person has or claims to have any interest in such books, records, etc.

III.

Answering Paragraph VIII of the Petition respondent alleges that she did not produce said books, records, papers and data at the time and place set forth in the summons, and further alleges that at said time and place she, among other things, relied upon and asserted her rights under the Fifth Amendment to the Constitution of the United States to refuse to incriminate herself.

/s/ ROBERT W. CONYERS,
Attorney for Respondent.

Duly verified.

[Endorsed]: Filed January 5, 1955. [11]

[Title of District Court and Cause.]

AFFIDAVIT OF JACK M. HARRISON RE PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Jack M. Harrison, being first duly sworn, deposes and says:

Affiant is an attorney-at-law, licensed to practice in the State of California and is admitted to practice before the Treasury Department. Affiant is a licensed certified public accountant in the State of California.

During the years 1950, 1951, 1952 and 1953 affiant was one of the attorneys of the Hubner Building Co. and of one E. J. Hubner, and kept books and records of Hubner Building Co., made entries thereon, and prepared the income tax returns for E. J. Hubner and for the Hubner Building Co.; that at all times during such years the books and records of Hubner Building Co. were kept in affiant's office and under his control.

Prior to November 10, 1952, one Henry N. Miller, known [12] to affiant as a revenue agent of the United States Treasury, examined the books and records of the Hubner Building Co. for the period February 14, 1950, through September 30, 1950, during which period said Hubner Building Co. was a corporation. As a result of that investigation, an adjustment in the tax liability of said corporation was made by way of an over-assessment of \$17,-766.99.

Between December 16, 1953, and March 2, 1954, one John L. McIver, known to affiant to be a revenue agent of the United States Treasury, conducted an investigation of the books, records, checks, invoices, credits, and other data and memoranda of the Hubner Building Co. for the taxable years ending February 28, 1951, and February 29, 1952, and of the members of Hubner Building Co. for the taxable years ended December 31, 1951, and December 31, 1952. Such investigation was conducted on the premises and in the office of affiant and all such records of which affiant had control

were made available to said John L. McIver for examination and investigation.

During the period of investigation by said John L. McIver, said McIver, on occasion, had with him the aforesaid Henry Miller, who likewise conducted an examination of the aforesaid books and, in particular, such of the aforesaid books and records as related to the transactions had between Hubner Building Co. and Clifford O. Boren and Delta M. Boren and the Clifford O. Boren Contracting Co., Inc. Said Miller requested of affiant and received permission for the removal from said office of certain records, including checks, invoices and correspondence specifically relating to said transactions. Affiant understood that these records were removed by said Miller for the purpose of photostating the same. Thereafter said records were returned to affiant and replaced in the files of said Hubner Building Co.

/s/ JACK M. HARRISON.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal] /s/ JOHN A. BRANT,
Notary Public in and for Said
County and State.

[Endorsed]: Filed January 5, 1955. [13]

[Title of District Court and Cause.]

AFFIDAVIT OF BEATRICE EVELYN HUBNER
RE PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Beatrice Evelyn Hubner, being first duly sworn, deposes and says:

Affiant is the respondent made a party to the above-entitled action under the name of Evelyn Hubner. Affiant's maiden name was Beatrice Evelyn Newsome; affiant intermarried with E. J. Hubner on May 23, 1952.

Prior to the aforementioned marriage, on or about August 1, 1951, E. J. Hubner transferred and deeded to affiant, in her maiden name, certain real property in the County of San Diego, commonly known as the Big Oak Ranch.

Affiant, as wife of E. J. Hubner, filed a joint tax return with said E. J. Hubner for the taxable year ending December 31, 1952. Included in said tax return was income earned by E. J. Hubner as a partner in the Hubner Building Co. during the partnership's fiscal year, March 1, 1951, through and including February 28, 1952.

Affiant now has in her possession certain books and records which would fall within the definition set forth on the summons which is the subject of this [14] action. Said books and records relate to

income received by E. J. Hubner during the years 1951 and 1952, as reported on the joint tax return of respondent and E. J. Hubner for the taxable year ending December 31, 1952, as above set forth.

Affiant is informed and believes, and therefore states, that no other person has or claims any right or interest in the title or possession of said books and records.

/s/ BEATRICE EVELYN HUBNER.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal] /s/ H. M. FISHER,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Filed January 5, 1955. [15]

[Title of District Court and Cause.]

AFFIDAVIT OF H. M. FISHER RE PETITION
FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

H. M. Fisher, being first duly sworn, deposes and says:

He is one of the attorneys for Respondent Beatrice Evelyn Hubner (who is a party to this action under the name of Evelyn Hubner) and has been

acting as such since January, 1954. In the course of such employment he has represented Beatrice Evelyn Hubner in both her individual capacity and as executrix of the Estate of Elmer John Hubner, deceased. On or about April 26, 1954, affiant was contacted by John L. McIver, who was and is a Revenue Agent with the Bureau of Internal Revenue; that Mr. McIver represented that he had made an investigation of the Hubner Building Co. books and records and was in the process of ascertaining the necessity of making further assessments against the decedent, E. J. Hubner, and that for such purpose he was desirous of examining certain personal records of said E. J. Hubner and he therefore requested affiant to supply such records for examination. The years under investigation covered the period of the active operation of the Hubner Building Co., to wit 1950, 1951, [16] 1952 and 1953.

Affiant had a number of conversations with said McIver regarding the tax liability of E. J. Hubner and affiant supplied to McIver such records as he was able to discover and obtain. Upon the occasion of the first such conversation affiant asked said McIver whether McIver's investigation was an ordinary audit of the tax liability of E. J. Hubner or was in the nature of a fraud investigation, whereupon said McIver stated to affiant that at the time he considered it an ordinary audit and he hoped there would be no fraud matters involved. At the last conference held between affiant and McIver

affiant was shown McIver's work sheets and calculations. McIver informed affiant, on the basis of said calculations and work sheets, that said McIver calculated income tax deficiency of E. J. Hubner for the year ending December 31, 1951, in the amount of \$13,666.64, and that he calculated over-payment of E. J. Hubner and Beatrice Evelyn Hubner for the tax year ending December 31, 1952, in the sum of \$1,687.06. At such conference McIver requested affiant to procure acceptance by Beatrice Evelyn Hubner of such redetermination on Treasury Department Form No. 870. Thereupon affiant questioned said McIver on whether or not a fraud investigation was then under way or contemplated on the same years as to the same taxpayers and said McIver stated that he was not making a fraud investigation, but that there was a definite likelihood that a fraud investigation would be initiated. McIver further stated that any deficiency assessed against E. J. Hubner could be collected from certain real and personal property held by Beatrice Evelyn Hubner as her separate property, in that said E. J. Hubner during his lifetime had made a gift of certain real property, commonly known as Big Oak Ranch, San Diego County, to Beatrice Evelyn Hubner and that the aforesaid separate property could be traced back through the gift of Big Oak Ranch and that, therefore, such separate property would be subject to a transferee's liability under the Internal Revenue Code for deficiencies and fraud penalties.

On receiving such explanation from said McIver, affiant informed said McIver that he would not advise said Beatrice Evelyn Hubner to consent to the redetermination of tax for the years 1951 and 1952, as presented by said McIver, for the reason which affiant stated to said McIver that said Beatrice Evelyn [17] Hubner might find it necessary to protect her separate property against a transferee's liability on the deficiency then presented by said McIver, and that after the expenditure of time and money in the defense of her property, she might then find it necessary to again protect her separate property from a transferee's liability upon a possible fraud deficiency against said E. J. Hubner. Thereafter said Beatrice Evelyn Hubner received from the Director of Internal Revenue, U. S. Treasury Department Form No. 1200, commonly referred to as a thirty-day letter, which letter bore the date of September 7, 1954, and covered the aforesaid deficiency assessment of \$13,666.64 for the taxable year ending December 31, 1951, and that she also received from the Director of Internal Revenue U. S. Treasury Department Form No. 1200, commonly referred to as a thirty-day letter, which letter bore the date of September 7, 1954, and covered the aforesaid over-assessment of \$1,687.06 for the taxable year ending December 31, 1952.

On or about October 22, 1954, affiant attended a conference at which petitioner herein and Forrest Cawkins were present. Forrest Cawkins is known to affiant as an agent of the Treasury Department

and aiding and assisting petitioner in the investigation in which the summons which is the subject of this action was issued. At said conference affiant stated that he had reason to believe that the purpose of the investigation, pursuant to which the summons which is the subject of this action was issued, was, in fact, directed and concerned with the tax returns of E. J. Hubner for the period under investigation. He stated to petitioner and Cawkins that he did not feel that the records which were being sought should be delivered to them on the mere representation that they were being used to examine the tax liabilities of Clifford O. Boren and Delta M. Boren and not that of E. J. Hubner. Either petitioner or said Cawkins stated to affiant that affiant should take the statement on the summons then under consideration to the effect that it was directed to the tax liability of the Borens, to be an assurance from the Treasury Department that the affairs of Hubner were not under investigation. Whereupon affiant stated his opinion to be that neither petitioner nor Cawkins could give such assurance and that the statement on the summons above referred to did not constitute such an assurance [18] and, further, that affiant, as attorney for respondent, would permit the examination of the books of the Hubner Building Co. only if a full-written assurance by a person authorized to give such assurance in the Treasury Department were delivered to affiant or respondent. No such written

assurance has been delivered to affiant or respondent.

/s/ H. M. FISHER.

Subscribed and sworn to before me this 5th day of January, 1955.

[Seal] /s/ ROBERT C. THAXTON,
Notary Public in and for the County of San Diego,
State of California.

[Endorsed]: Filed January 5, 1955. [19]

[Title of District Court and Cause.]

AFFIDAVIT OF DELTA M. BOREN RE
PETITION FOR ORDER OF ATTACHMENT

State of California,
County of San Diego—ss.

Delta M. Boren, being first duly sworn, deposes and says:

On September 8, 1954, your affiant was contacted by a Mr. Charles D. Ford, who identified himself as a Revenue Agent, and arranged for a meeting with your affiant. Your affiant met with Mr. Ford on September 14, 1954.

On September 14, 1954, Mr. Ford informed your affiant that he had been conducting tax fraud examinations and that he was a fraud agent. He said that he had been sent down to San Diego to investigate the building industry.

Mr. Ford informed your affiant that Mr. Henry Miller had been sent in to make investigations for Mr. Ford, since he did not know whether he had been recognized as being a fraud agent.

On September 15, 1954, at another meeting with Mr. Ford, he stated to your affiant that he had been doing a tax fraud [20] investigation of E. J. Hubner.

/s/ DELTA M. BOREN,

Subscribed and sworn to before me this 3rd day of January, 1955.

[Seal] /s/ JOHN A. BRANT,

Notary Public in and for Said
County and State.

[Endorsed]: Filed January 5, 1955. [21]

[Title of District Court and Cause.]

BRIEF IN OPPOSITION TO PETITION FOR ORDER OF ATTACHMENT

Introduction

Respondent opposes the petition herein on the grounds (1) that the summons and petition herein are fatally defective, (2) that the respondent may not be required to produce the records prayed for because under the facts of the case such a required disclosure would be a violation of the Fourth and

Fifth Amendments to the United States Constitution.

Facts

The Hubner Building Co. was a corporation from February 14, 1950, to September 30, 1950. Thereafter the Hubner Building Co. was dissolved as a corporation and continued business as a partnership until the time of its dissolution on June 6, 1951, and its wind-up and final distribution on February 28, 1953. At all times the President of Hubner Building Co. was E. J. Hubner, who was a stockholder of the corporation and general partner of the partnership.

Respondent Beatrice Evelyn Hubner is the surviving spouse of E. J. Hubner, who died on January 12, 1954. Respondent married said E. J. Hubner on May 23, 1952, prior to which time her name was Beatrice Evelyn Newsome. [22]

On August 1, 1951, prior to the marriage of respondent and E. J. Hubner, he transferred to respondent, in her maiden name of Beatrice Evelyn Newsome, as her sole and separate property certain real property in San Diego County commonly known as Big Oak Ranch.

E. J. Hubner filed his own separate federal tax returns for the tax years ending December 31, 1950, and December 31, 1951. E. J. Hubner and respondent filed joint federal tax returns, as husband and wife, for the tax years ending December 31, 1952, and December 31, 1953.

The Bureau of Internal Revenue conducted an investigation of the Hubner Building Co., a corporation, after its dissolution, and as a result adjusted its return. This examination was conducted by the same Henry Miller hereinafter referred to.

Thereafter the Bureau of Internal Revenue conducted an extensive examination of the records of the Hubner Building Co. partnership and the records of E. J. Hubner, with particular reference to the taxable years of the Hubner Building Co. ending February 28, 1951, and February 29, 1952, and to the taxable year of E. J. Hubner ending December 31, 1951, and to the taxable year of E. J. Hubner and respondent ending December 31, 1952. Such examination was mainly conducted by Revenue Agent John L. McIver. As a result of such examination the Bureau of Internal Revenue assessed a deficiency against E. J. Hubner, personally, in the sum of \$13,666.64 for the taxable year 1951 and determined an over-assessment against E. J. Hubner and Respondent in the amount of \$1,687.06 for the taxable year 1952.

During the conduct of such investigation another revenue agent by the name of Henry Miller was conducting an examination of the same books and records for the same years, with particular reference to the transactions between the Hubner Building Co. and E. J. Hubner personally, on one hand, and Clifford O. Boren Contracting Co., Inc., Clifford O. Boren individually, and Delta M. Boren individually, on the other hand. Said Henry Miller

examined the aforesaid records at the same time and in the presence of John L. McIver. Henry Miller asked for and received permission to extract numerous documents, including checks, invoices and other papers, from the records of the Hubner [23] Building Co. for the purpose of photostating them. These documents were later returned by Henry Miller to the custodian of the Hubner Building Co. files.

After the examination had been completed by John L. McIver and Henry Miller, John L. McIver discussed the above deficiency and over-assessment with one of Respondent's attorneys and informed him that there was a likelihood of a fraud investigation against E. J. Hubner during the conduct of Hubner Building Co. and that such fraud investigation would necessarily relate to the personal tax liability of E. J. Hubner in the years 1950 and 1951 and all the personal tax liabilities of E. J. Hubner and Respondent, who filed joint tax returns for the years 1952 and 1953. John L. McIver during such discussion also stated that if such deficiencies as were assessed against E. J. Hubner in years prior to Respondent's personal liabilities by virtue of her signing a joint return, were not satisfied out of E. J. Hubner's personal estate, then such deficiencies could be assessed against Respondent's separate property traceable to the transfer from E. J. Hubner of Big Oak Ranch.

In making his examination the aforementioned Henry Miller was apparently working under the direction of one Charles D. Ford, an agent of the

Bureau of Internal Revenue then in charge of making fraud investigations into the tax returns of persons affiliated with the contracting business in San Diego County.

Respondent now lawfully has in her possession certain books, records, papers, paychecks, invoices, credits and other miscellaneous records, data and memoranda falling within the definition set forth in the summons which is the subject of this action. No person other than respondent has or claims any interest in the property or possession of such books, records, etc.

In compliance with the aforementioned summons, Respondent appeared at the time and place designated therein, with Robert W. Conyers, one of her attorneys, but Respondent did not produce any of the books, records or papers set forth therein on the grounds that said summons was defective and that she was entitled to withhold such books and records from the Bureau of Internal Revenue under protection of the Fifth Amendment to the Constitution of the United States. [24]

Respondent hereby makes reference to the Affidavits of Jack Harrison, H. M. Fisher, Delta M. Boren and Beatrice Evelyn Hubner, on file in this action, and by this reference incorporates the same herein as though set forth in full.

Law

The Treasury Department is entitled to but one examination of the taxpayer's books as a matter of

course. A second examination of the taxpayer's books for any one year may not be made except where the Secretary of the Treasury, or his delegate, require it (a) after investigation, and (b) when it is a necessity, and (c) after written notice to the taxpayer.

Sec. 7605(b) Internal Revenue Code.

Chandis Securities Co. v. Martin,
128 Fed. 2d 731 (CCA-9), affirming 33 Fed.
Supp. 478.

Internal Revenue Code Section 7605(b) is a limitation upon the power of the Treasury Department and not merely a right assertable only by the person against whom a tax liability is being investigated.

Chandis Securities Co. v. Martin, *supra*.

A third party whose tax liability is not under investigation may assert his right and the limitation on the Treasury Department under Section 7605(b) when his own books are sought to be examined a second time.

Chandis Securities Co. v. Martin, *supra*.

No examination is permitted of a taxpayer's books after three years has elapsed from the filing of a return, except on a factual showing indicating fraud, concealment or wrong-doing.

Chandis Securities Co. v. Martin, *supra*.

Zimmerman v. Wilson,
81 Fed. 2d 847 (CCA-3).

After examination and adjustment of tax liabilities of a taxpayer as to any one year no examination of a taxpayer's books is permitted, except on a factual showing indicating fraud, concealment or wrong-doing.

Zimmerman v. Wilson,
105 Fed. 2d 583 (CCA-3).

Agents may not "under official pretext, but in fact officiously, extend their powers beyond those provided by the law * * *." [25]

Newfield v. Ryan,
91 Fed. 2d 700 (CCA-5).

Cert. denied, 302 U. S. 729.

First National Bank v. U. S.,
160 Fed. 2d 532.

"The agents are not the sole judges as to the scope of the examination. They must satisfy the court that what they seek may be actually needed. Otherwise, they would be assuming inquisitorial powers beyond the scope of the statute."

Martin v. Chandis Securities Co.,
33 Fed. Supp. 478.

The right under the Internal Revenue Code to make a second examination must relate to particular matters and may not be the means of a "fishing expedition."

First National Bank v. U. S.,
160 Fed. 2d 532.

Chandis Securities Co. v. Martin,
128 Fed. 2d 731.

In the case of a summons or subpoena to produce papers, some evidence must be produced to show the materiality of the papers demanded.

Fed. Trade Comm. v. American Tobacco Co.,
264 U. S. 298; 44 S. Ct. 336; 68 L. Ed. 696.

Hale v. Hinkle,
201 U. S. 43; 26 S. Ct. 370; 50 L. Ed. 652.

To permit under color of a summons the examination of books and records covering years for which returns were filed more than three years prior to the issuance of the summons, without complying with the requirements of the Internal Revenue Code, would constitute an unlawful search and seizure.

Zimmerman v. Wilson,
81 Fed. 2d 847.

A subpoena duces tecum or summons requiring the production of documents must be limited to a reasonable period of time and specify with reasonable particularity the subjects to which the desired writings relate.

Hale v. Hinkle, *supra*.

Brown v. U. S.,
267 U. S. 134; 48 S. Ct. 288; 72 L. Ed. 500.

U. S. v. Medical Society,
26 Fed. Supp. 55 at 57; 18 Hughes Federal
Practice and Procedure, 280, Sec. [26]
23892.

Nothing short of the most explicit language should induce the court to attribute to Congress the intent to authorize a fishing expedition into private papers in view of the provisions of the Constitution against unreasonable searches and seizures.

Federal Trade Commission v. American Tobacco Co., 264 U. S. 298.

A penalty or forfeiture which is not in its nature purely remedial is in the broad sense a "criminal case" falling within the protection of the Fifth Amendment.

Boyd v. U. S.,
116 U. S. 616; 29 L. Ed. 746.

Lees v. U. S.,
150 U. S. 476; 37 L. Ed. 1150.

In considering the right of an individual to protection against compulsory self-incrimination under the Fifth Amendment to the United States Constitution, the definition of "criminal case" is much broader than when it is used in its technical sense in relation to procedural matters which may likewise be constitutionally guaranteed under other provisions.

U. S. v. Regan,
232 U. S. 37 at 50; 58 L. Ed. 494 at 499.

Hepner v. U. S.,

213 U. S. 103 at 111-12; 53 L. Ed. 720 at 723-24.

Cf. *Helvering v. Mitchell*,

303 U. S. 391, 58; S. Ct. 630, 82 L. Ed. 917.

(A case involving the procedural question of double jeopardy).

Argument

Petitioner by an administrative summons is attempting to force the production of books and records identified as belonging to the Hubner Building Co. but now in the sole and lawful possession of the Respondent.

Respondent urges that the proper jurisdictional basis for issuing of any summons to her is lacking. The affidavits on file and a part of the record in this action establish that the books and records sought by the summons have already been thoroughly examined and, in part, photostated by agents of the Bureau of Internal Revenue. As a result of these examinations, adjustments were made in the income and deductions of the corporation, the partnership, and [27] the individual members of the partnership. Nowhere in the record is it alleged, nor is it a fact, that any written notice has been given to Respondent or anyone else after the first examinations, nor has any showing of necessity been made in such a notice or to the Court, nor has any showing of subsequent investigation been made, all as required by

Section 7605(b) of the Internal Revenue Code to any second examination of a taxpayer's books.

It has been established in the Chandis case, cited hereinabove, that this Statute is a limitation on the powers of the Treasury which can be relied upon by any person whose books may be sought after one examination and regardless of whose tax liability may be the subject of inquiry.

Respondent does not have the possession of the books and records referred to in the Petition as a mere custodian. Such books and records reflect her personal tax liabilities for the year 1952 and 1953 and as such were required by law to be kept by her. No person has, or claims to have, any interest in the property or possession of the books identified in the Petition except the Respondent.

As to the year 1950 and the fiscal year ended February 28, 1951, referred to in the Petition, the summons and petition are fatally defective not only because no compliance with Section 7605(b) is shown, but because no examination is permitted by the statute of limitations applicable to those years without an allegation of fraud or misrepresentation (cf. Chandis case, *supra*). No such allegation is made.

Respondent, in refusing to produce the records called for, has also relied upon her privilege against self-incrimination set out in the Fifth Amendment to the Constitution of the United States. In spite of the fact that petitioner has alleged that only the

tax liability of Clifford O. Boren and Delta M. Boren was and is under inquiry, the Affidavits, which are a part of the record herein, outline several instances wherein attorneys for Respondent and others were advised by agents of the Bureau that, in fact, the tax liabilities of E. J. Hubner and of the Respondent were being inquired into, that the agents named therein were attempting to establish fraud on the part of the Hubners and that, in fact, one agent, Henry Miller, was conducting his investigations under the direction of Charles D. Ford, a Bureau agent then in charge of fraud investigations. [28]

Respondent's right under the Fifth Amendment to avoid the production of evidence incriminating to her will be of little service or dignity if they are to be denied because petitioner now represents to the Court that he is concerned, at the moment, with the tax liability of no one except the Borens.

Respectfully submitted,

SLOANE & FISHER,

ROBERT W. CONYERS,

By /s/ ROBERT W. CONYERS,

Attorneys for Respondent.

[Endorsed]: Filed January 5, 1955. [29]

[Title of District Court and Cause.]

BRIEF IN SUPPORT OF PETITION FOR ORDER OF ATTACHMENT OF PERSON FOR CIVIL CONTEMPT

An analysis of respondent's brief and supporting affidavits indicates that the respondent is relying upon three separate grounds in opposition to the summons which was served upon her in accordance with the provisions of the Internal Revenue laws. These three grounds succinctly stated are as follows:

1. That the summons is fatally defective on its face in that it specifies the year 1950 as one of the taxable years under investigation, and concludes that the three-year statute of limitations has run as to that particular year;

2. That the books and records as set forth in the summons have been examined by agents of the Internal Revenue Service and that additional examination is not authorized, under the law, and

3. That response by the respondent to the summons would tend to incriminate her within the meaning of the Fifth Amendment to the United States Constitution.

These three grounds will be discussed [30] hereinafter.

I.

Summons Valid on Its Face

The summons on file herein clearly discloses that the Internal Revenue Service is investigating the

income tax liability of Clifford O. Boren and his wife, Delta M. Boren, for the taxable years 1950, 1951, and 1952. Nowhere in said summons does it state that the investigation is directed towards the ascertainment of tax liability of respondent, the estate of Hubner, Hubner Building Company, or any other concern connected with respondent. The affidavits filed in support of respondent's resistance are insufficient as a matter of law to show that Internal Revenue Service is now or contemplates in the future an investigation of the respondent as aforesaid. The most that may be said of these affidavits is that the respondent thinks there may be some sort of an investigation of her tax returns for the year 1953. Your petitioner, on the other hand, has set forth by affidavits of appropriate Internal Revenue Officers showing that the investigation is not directed towards respondent, the estate of Hubner, the Hubner Building Company or other concern of respondent. To the contrary, it is clearly stated that the officers are directing their investigation strictly and solely toward the ascertainment of possible violations of the Internal Revenue Laws by Clifford O. Boren and Delta M. Boren. The true scope of the examination becomes material in view of the U. S. Treasury Department Form 872, marked Exhibit A, attached hereto and hereby made a part hereof. This form constitutes a consent by the Borens to the extension of the Statute of Limitations as to their civil tax liability for the year 1950 to and including June 30, 1955. Therefore, the summons is valid on its face.

In addition to the Form 872 Agreement, however, petitioner has signed an affidavit stating that the preliminary investigation of the Borens' tax return for the years 1950 and 1951 indicates that in excess of \$40,000.00 of taxable income was not included in their returns. The petitioner further stated that no justifiable or legal reason for such nondisclosure has been found to date. The only conclusion that can therefore be reached is the nondisclosure was and is fraudulent. In addition to the affidavits of the petitioner as aforesaid, the affidavit of Henry Miller has been filed which shows that in the opinion of Miller [31] and under the provisions of the Internal Revenue policies and procedures an indication of fraud was disclosed during the course of his examination of the transactions between the Borens and the Hubner Building Company. These two affidavits when considered in view of the other documents on file herein clearly show that there is reasonable grounds to believe that the Borens have engaged in fraudulent practices with respect to certain provisions of the Internal Revenue laws. So for still another reason, the summons is good on its face as to all documents, etc., requested and as to each of the years set forth.

II.

Books and Papers Once Examined

The statements set forth under "I" above pertaining to the taxpayer actually under investigation also bear on respondent's argument that her books and papers have been once examined by the In-

ternal Revenue Service. The affidavits on file herein in support of petitioner show that the examination of the Hubner Building Company, a partnership; Hubner individually, and as the estate of Hubner, and respondent was concluded, and there is not now nor contemplated any further investigation either of a civil or criminal nature. The books and records set forth in the summons are needed only for the purpose of the investigation of the Borens and as such respondent cannot complain. It is clearly shown that the books and records now in respondent's possession must be examined to ascertain the tax consequences of a customer of the Hubner Building Company and not the Hubner Building Company itself.

It would appear inconceivable that an investigation of a taxpayer such as made of the Hubner Building Company would forever bar Internal Revenue Service from thereafter again checking the books and records of the Hubner Building Company on matters pertaining to, and solely affecting, the tax liability of one of Hubner's customers. For example, the situation becomes clear if one assumes for the moment that a large bank is investigated by Internal Revenue Service for a certain taxable year and after such investigation arrives at a settlement of the tax liability for that particular year. Under respondent's theory the Internal Revenue Service would thereafter be precluded from again examining the bank's books and records, not only

as they may pertain to the bank's liability but also as they [32] may pertain to the tax investigation and the liability of all of the bank's depositors, customers, and the like. Such an interpretation would obviously be very strained and if carried to the dryly illogical extremes possible could effectively tie the hands of the Internal Revenue Service.

It is true that during the course of a preliminary audit and examination of the Borens by Henry Miller that certain of the books and records of the Hubner Building Company were scrutinized by Miller. It is likewise true as set forth in Miller's affidavit that he examined only certain of the Hubner books and did not conduct a full-scale examination as would be required under normal Internal Revenue Service practices and procedures. To the contrary, Mr. Miller examined the books and records only far enough to show to him that there was an indication of fraud. He, thereupon, concluded his investigation and referred the matter to his superiors.

It is respectfully submitted that the restrictions on examination of taxpayers' books of account were never intended to preclude a complete investigation of fraud. Under the Internal Revenue Service policy and procedures an agent is required to discontinue his examination when fraud is shown or indicated and when further investigation is necessary another division is assigned cognizance of the matter. Reason and common sense would seem to indicate that when the statute says that the books

of account shall be inspected only once for a taxable year, Congress meant that this be a full and final examination and not an examination only far enough to indicate fraud. The use of the words "unnecessary" examination or investigation would likewise tend to indicate that Congress had in mind not the thwarting of the Internal Revenue Service of their valid official functions but rather to prevent the harassment of taxpayers. The record on file herein clearly shows that neither the Borens or the respondent have been subjected to any unnecessary examination or investigation and in truth and in fact only a partial examination and investigation of the Borens has so far been conducted. The Borens have now declined permission to examine their individual records. The facts are much different here than in the Chandice Securities Company case relied upon so heavily by respondent. Also bearing on the question of the necessity of a complete examination are the affidavits of the petitioner and Mr. Miller setting forth the facts pertaining to fraudulent conduct on the part of the Borens. [33]

III.

Self-Incrimination

Again it is respectfully submitted that respondent is not being investigated by Internal Revenue Service and no investigation is contemplated in the future. In any event, however, respondent cannot avail herself of the privilege guaranteed under the Fifth Amendment of the Constitution on the state

of the record presented by her. Nowhere is it shown that respondent by any stretch of the imagination could be subjected to criminal prosecution. The most that can be said on the basis of papers filed in support of her opposition to your petitioner is that she might be liable as a transferee for inadequate consideration. This, of course, if true, would subject her to civil liability and not criminal prosecution.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

HARRY D. STEWARD and
HOWARD R. HARRIS,
Assistants United States
Attorney;

By /s/ HARRY D. STEWARD,
Attorneys for Petitioner. [34]

Points and Authorities

Government agents making examination under statute permitting internal revenue agents to examine books, papers, records or memoranda bearing upon matters required to be included in income tax return, are performing a public function, and are presumed to do their duty, and it cannot be assumed that they will abuse their authority in carrying out the examination.

Under statute permitting internal revenue agents to examine books, papers, records or memoranda

bearing upon matters required to be included in income tax return, internal revenue agent, and not the keeper of the records, is authorized to determine what items appearing in the records are related to the tax returns under investigation.

(U. S. v. First Nat. Bank of Mobile,
67 F. Supp. 616, modified 160 F. 2d 532.)

Statute which fixes certain general time limitations upon the assessment, or suit for collection, of income taxes, has no applicability upon need for an investigation for the detection of false or fraudulent returns, nor does it have any relation to the period which may be covered by such investigation.

(U. S. v. Peoples Deposit Bank & Trust Co.,
112 F. Supp. 720.)

In view of scope and purposes of statute authorizing Commissioner of Internal Revenue, for purposes of ascertaining correctness of income tax return, to authorize employees of Bureau of Internal Revenue to examine books, papers, records, or memoranda bearing on matters required to be included in income tax return, and to require attendance of any person having knowledge in the premises, courts should not circumscribe unduly the officials of the government in performing duties in investigation of tax fraud.

(Stone v. Frandle, 89 F. Supp. 222.) [35]

Statute permitting Internal Revenue agent to examine books, papers, records and memorandum, bearing upon matters required to be included in income tax return, can be applied to books of persons other than taxpayer whose return is under investigation.

Words in statute permitting Internal Revenue agent to examine books and records bearing upon matters required in income tax return must be interpreted liberally to fulfill the purpose for which statute was enacted.

(U. S. ex rel. Sathre v. Third Northwestern Nat. Bank, 102 F. Supp. 879.)

A third party will be required to produce records bearing on income tax return under statute, where internal revenue agent specifies records with sufficient precision for their identification, and agent's demands are within scope of statute, and agent alleges that documents bear on matters required to be included in return, and agent's demands are not too general and are not merely exploratory fishing expeditions.

(First Nat. Bank of Mobile, et al., v. U. S., 160 F. 2d 532.)

We have heretofore noted that the power granted to the Commissioner by 26 U.S.C.A., Sec. 3614, is inquisitorial in character and is similar to the power vested in federal grand juries. As said by the Eighth Circuit in *Brownson v. United States*,

supra, 32 F. 2d at page 848, “* * * the statutes involved * * * should receive a like liberal construction in view of the like important ends sought by the government.”

(*Falsone v. United States*, 205 F. 2d 742.)

Words in statute permitting Internal Revenue agent to examine books and records bearing upon matters required in income tax return must be interpreted liberally to fulfill the purpose for which statute was enacted.

(*U. S. ex rel. Sathre v. Third Northwestern Nat. Bank*, 102 F. Supp. 880.) [36]

Government agents making examination under statute permitting internal revenue agents to examine books, papers, records or memoranda bearing upon matters required to be included in income tax return, are performing a public function, and are presumed to do their duty, and it cannot be assumed that they will abuse their authority in carrying out the examination.

(*U. S. v. First Nat. Bank of Mobile, et al.*, 67 Fed. Supp. 616-617.)

Zimmermann v. Wilson, 81 F. 2d 847, cited by respondent, was considered and rejected by the Honorable L. Hand.

McMann v. Securities and Exchange Commission, 87 F. 2d 377.

The Court's attention is respectfully directed to this entire case and the excellent reasoning set forth therein.

If during an investigation of an income, excess profits, estate or gift tax return (including a return under the Vinson Act, as amended) an internal revenue agent discovers what he believes to be indications of fraud, he will immediately suspend his investigation and report his findings in writing to the Chief of the Audit Division * * *

(Internal Revenue Manual,
Section 4567.) [37]

EXHIBIT A

Form 872

U. S. Treasury Department
Internal Revenue Service

(Revised Feb. 1953)

Original

CONSENT FIXING PERIOD OF LIMITATION UPON ASSESSMENT OF INCOME AND PROFITS TAX

Copy

(Received Jan. 5, 1954. Director of Internal Revenue, Audit Division, Los Angeles, California.)

....., 19.....

In pursuance of the provisions of existing Internal Revenue Laws Clifford O. and Delta M. Boren, a taxpayer (or taxpayers) of San Diego, California, and the Commissioner of Internal Revenue hereby consent and agree as follows:

That the amount of any income, excess-profits, or war-profits taxes due under any return (or returns) made by or on behalf of the above-named taxpayer (or taxpayers) for the taxable year ended December 31, 1950, under existing acts, or under prior revenue acts, may be assessed at any time on or before June 30, 1955, except that, if a notice of a deficiency in tax is sent to said taxpayer (or taxpayers) by registered mail on or before said date, then the time for making any assessment as aforesaid shall be extended beyond the said date by the number of days during which the Commissioner is prohibited from making an assessment and for sixty days thereafter.

/s/ CLIFFORD O. BOREN,
Taxpayer.¹

/s/ DELTA M. BOREN,
Taxpayer.¹

¹This consent may be executed by the taxpayer's attorney or agent, provided such action is specifically authorized by a power of attorney, which, if not previously filed, must accompany the consent.

If executed with respect to a year for which a Joint Return of a Husband and Wife was filed, this consent must be signed by both spouses unless one spouse, acting under a power of attorney, signs as agent for the other.

If a consent form is executed by a person acting in a fiduciary capacity, such as executor, administrator, or trustee, such person must submit Form 56, "Notice to the Commissioner of Internal Revenue of Fiduciary Relationship," together with certified copy of letters of administration, letters testamentary, trust instruments, or court certificate.

[Seal²] By

/s/ T. COLEMAN ANDREWS,
Commissioner of Internal
Revenue.

By GDM.

1-6-1954.

[Endorsed]: Filed January 12, 1955. [38]

[Title of District Court and Cause.]

AFFIDAVIT OF LLOYD M. TUCKER

United States of America,
Southern District of California—ss.

Lloyd M. Tucker, being first duly sworn, deposes and says:

That I am now and have been for the last nine years a Special Agent of the Internal Revenue Service and for the four years last past have been assigned to the San Diego Office of the Internal Revenue Service. That my duties primarily con-

²If this consent is executed on behalf of a corporation, it shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which the seal of the corporation must be affixed. Where the corporation has no seal, the consent must be accompanied by a certified copy of the resolution passed by the board of directors, giving the officer authority to sign the consent.

cern the investigation of alleged evasions of income taxes and matters related thereto in the enforcement of the Internal Revenue laws:

That I was assigned to the investigation of the tax returns of Clifford O. Boren and his wife, Delta M. Boren, for the years 1950 and 1951. That during the course of this investigation summonses were issued to various parties calling upon them to produce certain records and evidence pertaining to the tax liability of the Borens. One of such summonses was issued to respondent Evelyn Hubner for the books and records in her possession which pertained to the transactions between the Hubner Building Company and the Borens. [39]

That my investigation was directed solely towards the Borens and it was in no wise directed toward the tax liability, if any, of the estate of Hubner or the respondent. That I am informed and believe and upon such information and belief state that the only tax matters of the Hubner Building Company, of Hubner Estate, or respondent, now being considered in any respect by Internal Revenue Service is the matter set forth in the affidavit of John L. McIver, as filed herein. In addition, I am in a position to know whether an investigation of a non-civil nature of the estate of Hubner or the respondent is being conducted or contemplated by Internal Revenue Service and I know of no such investigation or contemplated investigation.

Preliminary investigation of the taxable years 1950 and 1951 of the Borens shows that in excess of

\$40,000.00 of taxable income was not reported by the taxpayers as required by law. No evidence has been discovered to date tending to show that this nondisclosure was due to mistake, inadvertence, or other justifiable or legal reason, or tending to show that it was not done with the purpose and intent to evade and defeat the payment of the taxpayers' income taxes.

The transactions between the Hubner Building Company and the Borens are material and relevant as to the extent of the nondisclosure and as to whether in fact such nondisclosure was fraudulent.

/s/ LLOYD M. TUCKER.

Subscribed and Sworn to before me, this 11th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California,

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [40]

[Title of District Court and Cause.]

AFFIDAVIT OF JOHN L. McIVER

United States of America,
Southern District of California—ss.

John L. McIver, being first duly sworn, deposes and says:

That I am an Internal Revenue Agent having been so employed for a period of thirty-three years; that I am presently assigned to the Internal Revenue Service at San Diego, California; that my duties in connection with such position are the examination of income tax returns and their verification; that my duties are solely confined to matters concerning the civil tax liability of taxpayers as distinguished from investigation of possible criminal liability.

That pursuant to the existing procedures I was assigned to investigate the civil tax liability of the Hubner Building Company, a partnership, composed of E. J. Hubner, Alton Bookman Jackson, and Wrelton Clarke. I initially audited the books and records of the Hubner Building Company and as a result of such audit determined that there were a number of changes in the reported income [41] which would result in an increase in the net income to the partnership. As a result of this investigation I secured a Form 875 Agreement from the partnership through Alton Bookman Jackson, one of the partners. This form in effect concurs with the findings of the examining officer, and for all practical

purposes finally disposes of the civil aspects of the tax consequences. I, thereafter, traced the additional income which was occasioned but not reported by partners on their individual returns. This resulted in a net deficiency on the return of Jackson, Clarke and Hubner. With respect to Hubner it was necessary to the proper evaluation of the additional income reflected by the partnership that I examine all available records pertaining to his individual income. The result of the audit of Hubner showed that Hubner was individually liable for additional income tax. A Form 870 Agreement was prepared and presented to Mr. Fisher, attorney for the estate of E. J. Hubner, setting forth the results of my investigation of Hubner individually. Mr. Fisher then advised me that the estate of Hubner had insufficient assets to pay the deficiency; whereupon, I inquired as to what had become of the Big Oak Ranch which showed as an asset of Hubner. I was then advised that the ranch had been deeded to respondent in consideration for a loan of \$20,000.00. I then advised Mr. Fisher that the records reflected that Hubner had expended close to \$100,000.00 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration, and as such respondent might be liable individually under the existing regulations. Several days later Mr. Fisher advised me that he had recommended to his client that she not execute the Form 870 Agreement. In accordance with the existing regulations and instructions of the Internal Revenue Service, I rendered a complete

report of the entire transaction to my superior and was thereafter no longer concerned with the case.

The offering of the Form 870 Agreement is an indication by the Internal Revenue Service that such deficiency if accepted will close the case against the taxpayer. Under the normal procedure, if Mrs. Hubner had signed the Form 870 Agreement the matter with respect to her liability and the [42] liability of the estate of Hubner would be closed by the Internal Revenue Service.

As stated above, my function with Internal Revenue Service is confined solely to ascertainment of civil tax liability under the regulations in effect at all times material herein. If any indications of fraud are found, the investigation is immediately discontinued by me and a report made in writing to the chief of the Audit Division. As far as I am concerned, as an Internal Revenue Agent, the matter is then closed.

During a full investigation of all available records of the Hubner Building Company and Hubner individually, I discovered no evidence of fraud and consequently did not refer the matter to my superior as I would have been required to do under the regulations aforesaid. Based upon my thirty-three years of experience as an Internal Revenue Agent, it is my opinion that another investigation of the books and records which I examined of the Hubner Building Company and Hubner individu-

purposes finally disposes of the civil aspects of the tax consequences. I, thereafter, traced the additional income which was occasioned but not reported by partners on their individual returns. This resulted in a net deficiency on the return of Jackson, Clarke and Hubner. With respect to Hubner it was necessary to the proper evaluation of the additional income reflected by the partnership that I examine all available records pertaining to his individual income. The result of the audit of Hubner showed that Hubner was individually liable for additional income tax. A Form 870 Agreement was prepared and presented to Mr. Fisher, attorney for the estate of E. J. Hubner, setting forth the results of my investigation of Hubner individually. Mr. Fisher then advised me that the estate of Hubner had insufficient assets to pay the deficiency; whereupon, I inquired as to what had become of the Big Oak Ranch which showed as an asset of Hubner. I was then advised that the ranch had been deeded to respondent in consideration for a loan of \$20,000.00. I then advised Mr. Fisher that the records reflected that Hubner had expended close to \$100,000.00 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration, and as such respondent might be liable individually under the existing regulations. Several days later Mr. Fisher advised me that he had recommended to his client that she not execute the Form 870 Agreement. In accordance with the existing regulations and instructions of the Internal Revenue Service, I rendered a complete

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As stated above, my function with Internal Revenue Service is confined solely to ascertainment of civil tax liability under the regulations in effect at all times material herein. If any indications of fraud are found, the investigation is immediately discontinued by me and a report made in writing to the chief of the Audit Division. As far as I am concerned, as an Internal Revenue Agent, the matter is then closed.

During a full investigation of all available records of the Hubner Building Company and Hubner individually, I discovered no evidence of fraud and consequently did not refer the matter to my superior as I would have been required to do under the regulations aforesaid. Based upon my thirty-three years of experience as an Internal Revenue Agent, it is my opinion that another investigation of the books and records which I examined of the Hubner Building Company and Hubner individu-

ally would not disclose fraud by Hubner or the partnership.

I have examined the brief and supporting affidavits filed by respondent purporting to state that I advised respondent's attorneys that there was a likelihood of a fraud investigation of Hubner. I do not recall ever having made such a statement and wish to state that it would be contrary to the instructions of the Internal Revenue Service and I would, therefore, not have made such a statement.

/s/ JOHN L. McIVER.

Subscribed and Sworn to before me, this 12th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of California;

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [43]

[Title of District Court and Cause.]

AFFIDAVIT OF HENRY N. MILLER

United States of America,
Southern District of California—ss.

Henry N. Miller, being first duly sworn, deposes and says:

I have been an Internal Revenue Agent for the past thirteen years and I am presently assigned to

the San Diego Office of the Internal Revenue Service; that my duties are primarily the examination of income tax returns of various taxpayers, pertaining to the civil aspects of the Internal Revenue laws.

In accordance with normal Internal Revenue Service procedures, I was assigned to examine the books and records of the Hubner Building Company, a corporation. An examination of its books and records disclosed that the corporation was in existence for a few months only. After a full audit, it was determined that in fact the corporation had overpaid its income tax for the taxable period during 1950, and a report was submitted recommending payment of the over-assessment. This concluded my portion of the examination of the Hubner Building Company, a corporation, and to the best of my knowledge concluded all investigation by Internal Revenue Service with respect to this particular corporation.

At a later time I was assigned to examine the books and records of Clifford O. Boren and Delta M. Boren. While conducting the investigation of the Borens, [44] I learned that Mr. McIver, Internal Revenue Agent, was likewise conducting a similar investigation of the Hubner Building Company, a partnership. It was noted that certain transactions were had between Borens and the Hubner Building Company, and in an effort to determine the accuracy of my audit I checked certain of the Hubner Building Company books and records

pertaining to the Borens. The records that I checked were the cash disbursement journal, cancelled checks, and supporting invoices reflecting payments from Hubner Building Company to the Borens. I thereafter compared these records with the records of the Borens and noted certain discrepancies. These discrepancies, when considered in light of other facts which were available, led me to believe that there were indications of fraud. Pursuant to the policies and procedures of Internal Revenue Service, I thereupon immediately reported my findings in writing to the Chief of the Audit Division and suspended all further investigations.

I did not examine any books and records other than related above nor did I take the statements of or discuss with any representative of the Hubner Building Company the matters disclosed by my examination.

My examination of the Hubner books and documents as related above is not in any sense a complete examination, and in order to secure an accurate and complete picture of the transactions between Hubner Building Company and the Borens it is my opinion that other documents, papers, etc., would have to be examined and statements taken from those concerned. Such additional examination and investigation is, of course, not within the per-view of my duties.

/s/ HENRY N. MILLER.

Subscribed and Sworn to before me, this 12th day of January, 1955.

[Seal] EDMUND L. SMITH,
Clerk, U. S. District Court, Southern District of
California;

By /s/ HELEN M. WHITE,
Deputy.

[Endorsed]: Filed January 12, 1955. [45]

[Title of District Court and Cause.]

REQUEST FOR ADDITIONAL FINDINGS
AND FOR AMENDMENTS TO FINDINGS
OF FACT

Respondent requests the following additions and amendments to the Findings of Fact proposed by petitioner.

I.

At Paragraph III thereof, by striking out the words "as Executrix of the Estate of Elmer J. Hubner" on Line 16 and by striking out the words "any and all" at Line 18 of the findings proposed by petitioner, and

By adding to Paragraph III thereof, at Line 17, the words "certain of" so that Line 17 of Paragraph III would then read "has custody of certain of the books of account," etc.

II.

By adding to Paragraph IV of the findings submitted by petitioner, the following: "That said refusal was based upon the grounds (a) that a response to the Summons would tend to [55] incriminate respondent within the meaning of the Fifth Amendment to the Constitution, and (b) that petitioner had not complied with the requirements under Section 7605(b) of the Internal Revenue Code for a second examination of respondent's books, and (c) that the requested examination violated respondent's rights under the Fourth Amendment to the United States Constitution."

III.

At Paragraph VI thereof, by striking out the words "that said partnership consisted of Elmer J. Hubner, Alton B. Jackson and Wrelton Clarke" at Lines 6 and 7, and

By adding to Paragraph VI thereof the words "that Elmer J. Hubner was at all times a general partner in and President of said partnership."

IV.

By adding to Paragraph VII thereof the following: "That the books and records of the Hubner Building Company, a partnership, reflect the personal tax liabilities of respondent for the years 1952 and 1953; that affiant filed a joint tax return with Elmer J. Hubner for the taxable year ending December 31, 1952. Included in said tax return was

income earned by Elmer J. Hubner as a partner in the Hubner Building Company during the partnership's fiscal year, March 1, 1951, through and including February 28, 1952."

V.

By striking out from Paragraph IX thereof, on **Page 4 at Line 4**, the following words: "That sufficient evidence of fraud by the taxpayers, Clifford O. Boren and Delta M. Boren, has been shown," and

By adding to Paragraph IX, Page 4, in the place of the words requested stricken the following words, "that during the course of a prior examination of the transactions between the Borens and the Hubner Building Company an indication of fraud was [56] disclosed to."

VI.

By striking out from Paragraph X thereof the words, "that investigation of the Borens has only been commenced and is not a full examination within the meaning of the provisions of the Internal Revenue Act."

VII.

By adding another paragraph to the proposed findings to be known as Paragraph XI to read as follows: That the books and records as set forth in the Summons have been examined once by agents of the Internal Revenue Service for the years 1950, 1951, 1952 and 1953 and that neither petitioner nor anyone else complied with the provisions of Section

7605(b) of the Internal Revenue Code prior to serving the Summons in the instant case on respondent.

Respectfully submitted,

SLOANE & FISHER,

ROBERT W. CONYERS,

By /s/ ROBERT W. CONYERS,
Attorneys for Respondent.

Receipt of copy acknowledged.

[Endorsed]: February 14, 1955. [57]

[Title of District Court and Cause.]

MEMORANDUM

This is a proceeding which is filed under the provisions of Section 7604 of the 1954 Internal Revenue Code,¹ seeking the enforcement by this court

¹“§ 7604. Enforcement of summons.

“(a) Jurisdiction of district court—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district Court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

“(b) Enforcement—Whenever any person summoned under Section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States

of a subpoena issued by the Internal Revenue Bureau under Section 7602² of that Code.

According to the face of the summons, the investigation concerns the tax liability of Clifford O. Boren and Delta M. Boren. The summons is directed to the respondent, Evelyn Hubner, requiring her to appear on November 29, 1954, before Lloyd M. Tucker, an internal revenue officer, and to bring the books and records of the partnership known as the Hubner Building Company, and the corporation known as the Hubner Building Company, relating to transactions had by that partnership with the said Clifford O. Boren and Delta M. Boren

Commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or the commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States Commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience." (Formerly Sections 3633(a) and 3615(e) of Title 26, U.S.C.A.) [58]

²§ 7602. Examination of books and witnesses.

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or

for the years 1950, 1951 and 1952, together with pay checks, invoices, correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

The respondent appeared at the time and place set in summons, but declined to produce any of the books and records claiming that to do so would violate her right against self-incrimination under the Fifth Amendment. This proceeding [59] followed.

The Fifth Amendment provides:

“No person * * * shall be compelled in any criminal case to be a witness against himself * * *”

collecting any such liability, the Secretary or his delegate is authorized:

“(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

“(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

“(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.” (Formerly Sections 3614, 3615(a), (b), (c), and 3632(a)(1) of Title 26, U.S.C.A.)

Its prohibitions have been extended by judicial interpretation to reach beyond a criminal "case," so as to include almost every kind of a proceeding or act done under authority or color of authority wherein a person in answer to a question might give a fact which might lead to other evidence which might tend to connect that person with the commission of a crime. They are the so-called "rungs of a ladder" or "link in a chain" cases. *Blau v. United States*, 340 U. S. 159; *Hoffman v. United States*, 341 U. S. 479; *Greenberg v. United States*, 343 U. S. 918; *Singleton v. United States*, 343 U. S. 944; *United States v. Weisman* (2 Cir., 1940), 111 F. 2d. 260; *Kasinowitz v. United States* (9 Cir., 1950), 181 F. 2d. 632; *United States v. Coffey* (3 Cir., 1952), 198 F. 2d. 438.

The Third Circuit, in deciding the Coffey case (*supra*) commented on the Hoffman, Greenberg and Singleton cases (*supra*) and the Mason case (244 U. S. 362) and said:

"[2] Accordingly, we now have to reinterpret the Supreme Court's Hoffman opinion in the light of that court's subsequent revelation that Hoffman proceeds on a theory broad enough to require the same result in the circumstances of Greenberg and Singleton. Specifically, we think the problem is what to do about apparently innocuous questions, the answers to which are admittedly not incriminating in themselves when there are not additional facts before the Court which suggest particular connecting links through which the answer might lead to and might result in incrimination of

the witness. We think the Supreme Court is saying that such facts are not necessary to the sustaining of the privilege. The decision in the Mason case would not be followed today. It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime against the United States, and (2) that this suggested course and [60] scheme of linkage not seem incredible in the circumstances of the particular case."

Carried to the logical extreme, the doctrine of those cases would permit a witness to stand mute in response to any question, such as a query as to one's name or address, since a response could conceivably be a connecting link.

But I do not read the Constitution or the doctrine of the above cases as intending to completely paralyze the Government in its investigative functions. Certainly not under the facts in this case.

From the petition for attachment, the answer and the affidavits filed on both sides, it is apparent that the investigation being conducted by the Internal Revenue Bureau is not an investigation of the respondent, Evelyn Hubner, for any possible criminal liability, tax, or otherwise. It is an investigation directed to the affairs and possible tax liability and possible criminal liability of Clifford O. Boren and Delto M. Boren, both of whom are persons different than the respondent, Evelyn Hubner, and neither of whom appears to have been an officer, director,

employee or partner of either Hubner Company, corporation or partnership.

It appears that the Hubner Building Company was engaged in the building business. It was a corporation from February 14, 1950, to September 30, 1950, at which time the Hubner Building Company was dissolved as a corporation and continued business as a partnership until the time of its dissolution on January 6, 1951. Its affairs, however, according to the affidavit, were not finally wound up until February 28, 1953.

The respondent, Beatrice Evelyn Hubner, is the surviving spouse of E. J. Hubner who died January 12, 1954, and who appears to have been the moving factor of the [61] corporation, Hubner Construction Company, and one of the partners while it was a partnership. Respondent did not marry E. J. Hubner until May 23, 1952, after the dissolution of the partnership and after the dissolution of the corporation.

The books which are sought here are the books and records of the partnership and/or the corporation. It is quite apparent from the pleadings and affidavits filed here that the respondent, Evelyn Hubner, is not and was not, either a stockholder, director, or officer of the corporation, or a partner of the partnership, or an employee of either.

Some claim is made that by virtue of a transfer of certain property known as the Big Oak Ranch by E. J. Hubner to the respondent in this case,

which occurred in 1951 prior to the marriage, the respondent is fearful that the Government may make some additional tax claim arising out of the affairs of the Hubner Building Company or Hubner personally and, in connection therewith, attempt to pursue the property which was thus transferred to the respondent.

That is not a sufficient ground for the refusal to answer any questions or to present any records, even though the disclosures made might result in a civil proceeding against the respondent for the recovery of that property so transferred to her to satisfy any tax liability which might be assessed against E. J. Hubner or the Hubner Building Company.

A civil proceeding attempting to enforce civil liability under the internal revenue statutes is not protected by the Constitutional guaranties of the Fifth Amendment—*Helvering v. Mitchell* (1938), 303 U. S. 391.

Although not raised at the time of response to summons or in the answer filed to the petition, respondent [62] in her brief relies upon the provisions of Section 7605(b) of the 1954 Internal Revenue Code (formerly 26 U.S.C.A. 3631), which reads as follows:

“§ 7605. Time and place of examination.

“* * *

“(b) Restrictions on examination of taxpayer—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection

of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

It is conceded by the government that the Internal Revenue Bureau conducted a previous examination of the books of both the corporation and partnership which resulted in additional assessments and refunds to the Hubner Company. Those books were examined with a view of determining only the liability of the Hubner Companies or E. J. Hubner, and were not examined with a view of determining the liability of the Borens or either of them.

The respondent in the brief relies largely upon the case of *Martin v. Chandis Securities Co.* (9 Cir., 1942), 128 F. 2d. 731.

In that case, while it did involve the enforcement of a subpoena and the examination of books and records in the hands of the Chandis Securities Company concerning the possible tax liability of a third person named Chandler, the court there stated that Section 3631 [now 7605(b)] of the Internal Revenue Code, limited the examinations of a taxpayer's (the Borens' here) books to those which were necessary, and likewise was a limitation on the power of the Bureau to examine a third person's (respondent here) books only when such examination was shown to be "necessary." [63]

However, upon an analysis of that case, it becomes quite evident that all that the Ninth Circuit held was that where the statute of limitations on the face of the record had expired against the taxpayer under investigation, an examination of the third person's books was not necessary. The examination was prohibited solely on that ground and not because there had been a prior examination.

There is no such element present in this case. The statute of limitations against the persons under investigation, the Borens, has not run, and if it has run, the Borens themselves have consented to an extension of time, having signed a consent extending the period of limitation upon assessment of income tax and profits tax. Therefore, the Chandis Securities case is not authority for the position taken by the respondent in this case.

Furthermore, the Chandis case would have another ground of distinction, as in that case they sought in the year of 1940 to compel the production of records from 1916 to 1930. No such a situation is present here. The records which are sought to be examined are the records for the years 1950, 1951 and 1952, which are not comparable to the attempt in the Chandis case to procure records that were many years old.

Moreover, as I view the provision of the Internal Revenue Code which prohibits the examination of books which are unnecessary, it becomes a question of fact to be decided in each case as to whether such examination is or is not necessary.

The facts in this case show that the Hubner Companies had considerable dealings with the Borens, and that there is a possible additional tax liability of the Borens in excess of \$40,000.00 for the years 1950-1951; that the previous examination of the Hubner books indicated that a full audit [64] of them in connection with the Boren investigation would produce facts bearing upon the possible liability or non-liability of the Borens. The presently requested examination is thus "necessary." I have examined the other authorities cited and relied on by respondent, and find that they are not in point.

The respondent makes the point that the procedural requirements of 7605(b) were not complied with. The procedural requirement that a second or additional examination of a taxpayer's books can be made only at the taxpayer's request or on written notification of the Secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens). In such case the sole question which can be raised is necessary for the examination under the Chandis case, *supra*. Obviously the "taxpayer" referred to in Section 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence concerning the possible tax liability of some other person or persons.

Respondent also contends that the provisions of the Fourth Amendment to the Constitution against unreasonable searches and seizures justifies her refusal to comply with the summons.

It is only unreasonable searches and seizures which are prohibited. In *U. S. v. First National Bank* (Ala., 1924), 295 Fed. 142, affirmed 267 U. S. 576, the bank refused to produce its books and records in response to a summons issued under the same provisions of the statute here involved, as they then existed. The inquiry was not concerning the bank's tax [65] liability, but that of two individuals doing business with the bank. The court held the Fourth Amendment not applicable. The records sought here are not the personal records of the respondent. She merely has possession of them. Congress has by statute (26 U.S.C.A. 7602) authorized wide investigation and inquiry and it would completely frustrate the purposes of the statute if mere custodians of records could refuse to produce them in relation to investigation of the possible tax liability of another person.

The element of unreasonableness present in the *Chandis* case, *supra*, where numerous and burdensome records as much as 24 years old were sought is not present here; nor is there present the unreasonableness such as existed in *First National Bank of Mobile v. U. S.* (CCA 5, 1947), 160 F. 2d. 532, where the appellate court held the summons unreasonable only insofar as it required the bank

to examine over six million entries covering a five-year period in order to comply.

The demands of the summons are not unreasonable under the facts of the case before the court.

Another ground is suggested—that the books here are not material to the investigation. I do not think that the respondent here is in any position to raise that question. Whether they are material or are not material is a question which can be raised by the party involved, namely, the Borens, if it can be raised at all, and I do not think it can be raised in this kind of a proceeding by the person who is not being investigated as the taxpayer.

The prayer of the petition ought to be, and is, granted.

Rather than commit the defendant to jail for contempt until she produces the books, perhaps a method can be worked [66] out which would not be burdensome, either upon the respondent or upon the Government, and still, at the same time, would preserve to the respondent the records which she naturally wants to have preserved for whatever purpose she may desire or need them for herself or as administratrix of the estate of the deceased.

The United States Attorney will prepare findings of fact, conclusions of law, and order for my signature, granting the petition, committing the respondent to jail for contempt until she produces the books, which will be stayed until February 18, 1955, at 12:00 o'clock noon, and it will thereafter be

permanently stayed if the respondent, prior thereto, deposits all of the books and records with the Clerk of this court, where they may remain for examination by both respondent, at her convenience, and the Internal Revenue Agents, at their convenience.

Dated: San Diego, California, this 17th day of February, 1955.

/s/ PEIRSON M. HALL,
United States District Judge.

[Endorsed]: Filed February 17, 1955. [67]

United States District Court for the Southern
District of California, Southern Division

Civil No. 1691

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled cause came on regularly for hearing on February 3, 1955, Laughlin E. Waters, United States Attorney, and Harry D. Steward, Assistant United States Attorney, for petitioner;

respondent appearing personally and through her attorneys, Hugo M. Fisher and Robert W. Conyers, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

I.

That petitioner is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treasury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954. [68]

II.

That summons was duly issued and served by Lloyd M. Tucker on the respondent, Evelyn Hubner, on November 5, 1954, requiring that she appear before him to give testimony relating to the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952 and to bring with her and produce for examination the following books, records and papers at 527 Land Title Building, 235 Broadway, San Diego, California, on the 29th day of November, 1954, at 10:00 o'clock a.m.: Books of Account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company, relating to transactions had by that partnership and corporation with the above-named Clifford O. Boren and Delta M. Boren for the years above stated, together with pay checks, invoices, correspondence

and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and the above-named taxpayers.

III.

That respondent is executrix of the estate of Elmer J. Hubner, deceased. That she had and now has custody of Books of Account, and records described in said summons, and set forth in paragraph II hereof.

IV.

That respondent did wilfully and knowingly neglect and refuse to obey said summons in that respondent did appear at the time and place set forth in the summons but did not produce said books, records, papers and data.

V.

That respondent resides in San Diego County, California, within the Southern District of California, and that this Court has jurisdiction of this matter under the provisions of the Internal Revenue Code of 1954 and Title 28 of the United States Code, Sections 1340 and 1345.

VI.

That the Hubner Building Company was a corporation from February 14, 1950, to September 30, 1950; that said corporation was dissolved and business was continued as a partnership under the name of Hubner Building Company until the [69] date of its dissolution on June 6, 1951, and its windup and final distribution on February 28, 1953. That

said partnership consisted of Elmer J. Hubner, Alton B. Jackson and Wrelton Clarke.

VII.

That said Elmer J. Hubner intermarried with respondent on May 23, 1952, which marriage was dissolved by the death of E. J. Hubner on January 12, 1954. That the only connection respondent had with or interest in said Hubner Building Company and Corporation was as the wife of E. J. Hubner, deceased, and in no other capacity, and had no other connection with said Company or Corporation. Respondent did file a joint tax return with E. J. Hubner for the year ending December 31, 1952.

VIII.

That the books and records of the Hubner Building Company, a corporation, and the Hubner Building Company, a partnership, were investigated by agents of the Internal Revenue Service which investigation resulted in a final determination of the tax consequences of the corporation and an offer of final settlement of tax liability of the estate of E. J. Hubner, arising out of the operation of the Hubner Building Company, a partnership. That such tax liability is of a civil nature and would be concluded by acceptance of this offer. That no investigation of a criminal nature of the corporation or the partnership or of the estate of E. J. Hubner or the respondent is in progress or is contemplated by the Internal Revenue Service.

IX.

That the taxpayers under investigation by the

Internal Revenue Service are Clifford O. Boren and Delta M. Boren and not respondent, the Hubner Building Company, a corporation; the Hubner Building Company, a partnership; the estate of E. J. Hubner or any other association or individual connected with respondent.

That it has not been shown that respondent could be subjected to any criminal proceedings in connection with any of the books, records and miscellaneous documents which formed the subject matter of the summons, and it is only shown [70] that she might be subject to some civil liability as a transferee for inadequate consideration.

That sufficient evidence of additional tax liability by the taxpayers, Clifford O. Boren and Delta M. Boren, has been shown to warrant an investigation at this time. That the taxpayers, Clifford O. Boren and Delta M. Boren, have by written consent extended the statute of limitation with respect to civil liability until June 30, 1955.

X.

That the books and records and other documents as set forth in the summons are material to the investigation of the tax liability of Clifford O. Boren and Delta M. Boren and that an examination of said books, records and other documents by the Internal Revenue Service as set forth in the summons is not an unnecessary examination nor is it unreasonable either as to respondent or Clifford O. Boren and Delta M. Boren. That investigation of the Borens was commenced, and has not been

completed within the meaning of the provisions of the Internal Revenue Act.

XI.

That all the facts found to be true in the memorandum filed herein by the Court on the 17th day of February, 1955, are herein found to be true.

Conclusions of Law

I.

That the production of the books and records and documents set forth in the summons will not incriminate respondent under the Fifth Amendment of the Constitution.

II.

That respondent produce the books, records and documents specified in the summons in accordance with the provisions thereof.

III.

That compliance with the subpoena by Evelyn Hubner will not be oppressive so as to violate the Fourth Amendment of the Constitution.

IV.

That an attachment against the person of respondent should issue for failure to produce said books, records and documents. [71]

V.

That all conclusions of law in the memorandum filed herein by the Court on the 17th day of February, 1955, are incorporated herein.

Now, Therefore, It Is Ordered Adjudged and Decreed that an attachment against the person of Evelyn Hubner as and for contempt should and is hereby issued and the respondent is remanded to the custody of the Marshal, until she complies with said summons, but said attachment and commitment are stayed, however, until 12:00 noon, February 18, 1955, with further proviso that said stay of execution shall become permanent if on or before said time and date respondent shall deliver to the Clerk of this Court Books of Account of the partnership, known as the Hubner Building Company and the corporation, known as the Hubner Building Company, relating to transactions had by that partnership and corporation with Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, together with paychecks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and Clifford O. Boren and Delta M. Boren.

It Is Further Ordered that upon delivery of these Books of Account, records and other documents that agents of the Internal Revenue Service and agents of the respondent shall have the right at all reasonable times to examine said Books of Account, records and documents and may have photostatic copies of the same or any portion thereof by designation to the Clerk who shall use the facilities of the office of the Clerk of this Court for making such photostats.

Dated: Feb. 17, 1955.

/s/ PEIRSON M. HALL,

United States District Court
Judge.

[Endorsed]: Filed February 17, 1955.

Docketed and entered February 23, 1955. [72]

[Title of District Court and Cause.]

STAY OF COMMITMENT PENDING
PERFECTION OF APPEAL

On this 18th day of February, 1955, the parties hereto appearing by their counsel, Robert W. Conyers and H. M. Fisher for Respondent, and Howard Harris for Petitioner, and

On motion of Respondent for the stay of the commitment contained in the order of this court dated February 17, 1955, and

It appearing that Respondent has prepared a Notice of Appeal and desires to appeal the decision of the court herein; Now, Therefore, good cause appearing,

It Is Ordered, Adjudged and Decreed that further execution of the Order for Attachment against the person of Evelyn Hubner for contempt shall be, and it is hereby, stayed on condition that Respondent perfects her intended appeal herein within thirty days hereof and until application to the Appellate Court may be made for any further

stay and the action on such motion by the Appellate Court. This order and the stay herein granted shall expire forty days from the date hereof unless Respondent has within that time perfected her appeal and made application to the Appellate Court for a further stay.

Dated: February 18, 1955.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed February 18, 1955. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Evelyn Hubner, Respondent above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from a Final Judgment entered in this action on February 17, 1955, adjudging Respondent in contempt of this Court.

/s/ ROBERT W. CONYERS,
SLOANE & FISHER,
ROBERT W. CONYERS,
Attorneys for Respondent
Evelyn Hubner.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 24, 1955. [74]

In the United States District Court, Southern
District of California, Southern Division

No. 1691-SD Civil

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

Honorable Peirson M. Hall, Judge, Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

San Diego, California, February 3, 1955

Appearances:

For the Petitioner:

LAUGHLIN E. WATERS,

United States Attorney,

Los Angeles 12, California, by

HARRY D. STEWARD,

Assistant United States Attorney.

For the Respondent:

ROBERT W. CONYERS, ESQ.,

924 San Diego Trust & Savings Bldg.,

San Diego 1, California, and

SLOANE & FISHER,

1230 Bank of America Building,

San Diego 1, California, by

HUGO FISHER, ESQ.

February 3, 1955—2:00 o'Clock P.M.

The Clerk: 1690, Civil, Lloyd M. Tucker v. Hugo M. Fisher.

Mr. Steward: Ready for the petitioner.

Mr. Conyers: Ready.

The Clerk: 1691, Civil, Lloyd M. Tucker v. Evelyn Hubner.

Mr. Conyers: Ready.

Mr. Steward: Ready, your Honor.

The Court: Very well. As to Case 1690, I notice there is no response.

Mr. Steward: That is correct. I believe that was pursuant to an agreement, your Honor, that that matter on the representation previously made in court by Mr. Fisher would effect immediately no personal concern in this transaction other than as questions might be involved in respect to a motion for dismissal. So I would like at this time to file this document with the clerk.

The Court: Very well. Is there an order here?

Mr. Steward: Yes, your Honor. In the affidavit filed in Case No. 1691 it was represented that she has all the books and records involved.

The Court: In any event, this other matter is not involved in your petition?

Mr. Steward: No. [3*]

The Court: Very well. The proceedings as to Case No. 1690 will be dismissed.

As to 1691, I have read the petition, the responses and the affidavits and memorandum of law which have been filed.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Does either counsel wish to argue the matter? Do either of you have any additional points to present?

Mr. Steward: On behalf of the petitioner, your Honor, we are willing to submit it on the basis of the record as it now stands.

Mr. Conyers: I think we have nothing in addition to our briefs to offer at this time, your Honor.

The Court: Very well.

This is a proceeding which is filed under the provisions of Section 7604 of the Internal Revenue Code, seeking the enforcement by this court of a subpoena issued by the Internal Revenue Bureau in connection with an investigation, according to the face of the subpoena, of the tax liability of Clifford O. Boren and Delta M. Boren. This subpoena is directed to the petitioner, Evelyn Hubner, directing her to appear before Lloyd M. Tucker, and to bring the books and records of the partnership known as the Hubner Building Company, and the corporation known as the Hubner Building Company, relating to transactions had by that partnership with the aforesaid Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, together with paychecks, invoices, [4] correspondence, and any and all miscellaneous records, data and memoranda relating to the transactions between said partnership and the above-named taxpayers.

The respondent appeared at the time and place set forth in the subpoena, but the petitioner, how-

ever, declined to produce any of the books and records claiming that it would be a violation of the Fifth Amendment, and this proceeding followed.

From the answer to the petition for attachment and from the affidavits filed, it is apparent that the investigation being conducted by the Internal Revenue Bureau is not an investigation of the respondent, Evelyn Hubner, for any possible criminal liability. It is an investigation directed to the affairs and possible tax liability and possible criminal liability of Clifford O. Boren and Delta M. Boren, both of whom are persons who are different than the respondent, Evelyn Hubner.

It appears that the Hubner Building Company was engaged in the building business. It was a corporation from February 14, 1950, to September 30, 1950, at which time the Hubner Building Company was dissolved as a corporation and continued business as a partnership until the time of its dissolution on June 6, 1951. Its affairs, however, according to the affidavit, were not finally wound up until February 28, 1953.

The respondent, Beatrice Evelyn Hubner, is the surviving [5] spouse of E. J. Hubner, who appears to be the moving factor of the Hubner Construction Company and one of the partners. She did not marry E. J. Hubner until May 23, 1952, after the dissolution of the partnership and after the dissolution of the corporation.

The books which are sought here are the books and records of the partnership and/or the corporation, with which it is quite apparent from the docu-

ments filed here that the petitioner, Evelyn Hubner, is not and was not connected, nor does she appear to have been concerned as an employee of the Hubner Building Company, either as a corporation or as a partnership.

Some claim is made that by virtue of a transfer of certain property known as the Big Oak Ranch by E. J. Hubner to the respondent in this case, which appears to have occurred prior to the marriage, that the respondent is fearful that the Government may file some additional tax claim against the Hubner Construction Company and attempt to pursue the property that was thus transferred to the respondent in this case by the deceased E. J. Hubner.

That is not a sufficient ground for the refusal to answer any questions or to present any records, even though the disclosures made might finally result in a different proceeding against the respondent in this case for the recovery of that property transferred to the respondent which [6] the Government may have for any tax liability which might be found to be assessed against E. J. Hubner for the year involved.

The respondent in the brief relies largely upon the case of the Chandis Securities Company, and asserts that the Government, in sending the Revenue Bureau to examine the books, has already had one opportunity to examine the books of the Hubner Building Company, and have done so, and that the provisions of the code permit the examination of books, or rather prohibit the burdensome examina-

tion of books and do not permit it when it is unnecessary, as was the case in *Chandis Securities Co. v. Martin*, 128 F. (2d) 731.

In that case, while it did involve the enforcement of a subpoena and the examination of books and records in the hands of the *Chandis Securities Company* concerning the possible tax liability of a third person named *Martin*, the court there stated that Section 3614(a) of the Internal Revenue Code permitted the examination of taxpayer's books only when it is necessary and it might be taken as dicta in support of the respondent's position in this case.

However, an analysis of that case, in reading the decision of the appellate court and without having recourse even to the decision of the trial judge in that matter, it becomes quite evident that all that the Ninth Circuit held in the case of *Chandis Securities Co. v. Martin* was that under that [7] provision of the Internal Revenue Code it does not permit examination of the taxpayer's books where not necessary; that all it held in that case was that where the statute of limitations on the face of the record had expired, an examination of the third person's books is not necessary.

There is no such element present in this case. The statute of limitations against the persons under investigation, the *Borens*, has not run, and if it has run the *Borens* themselves have consented to an extension of time, having signed a consent fixing period of limitation upon assessment of income tax and profits tax. Therefore the *Chandis Securities*

case is not authority for the position taken here by the respondent in this case.

Furthermore, the Chandis case would have another ground of distinction, as in that case they sought in the year 1940 to compel the production of records from 1916 to 1930. No such a situation is present here. The records which are sought to be examined are the records for the years 1950, 1951 and 1952, which are not comparable to the period even which was attempted to be imposed in the Chandis case of making them produce records that were many years old.

Moreover, as I view the statute, the provision of the Internal Revenue Code which prohibits the examination of books which are unnecessary becomes a question of fact to be decided in each case as to whether they are or are not necessary. [8]

Some other grounds are suggested, that the books here are not material to the investigation. I do not think that the respondent here is in any position to raise that question. Whether they are material or are not material is a question which can be raised by the party involved, namely, the Borens, if it can be raised at all, and I do not think it can be raised in this kind of a proceeding by the person who is not being investigated as the taxpayer.

I think I have covered all of the points which have been raised by counsel in their briefs, and I imagine that you might guess by this time that the prayer of the petition ought to be, and is, granted.

I find myself in this position, however, or, rather, I think that rather than committing the defendant

to jail for contempt until she produces the books, that perhaps a method can be worked out which would not be burdensome, either upon the respondent or upon the Government, and still at the same time would preserve to the respondent the records which she naturally wants to have preserved for whatever purpose she may desire or need for herself or as administratrix of the estate of the deceased, which is another point here which is not in her favor because an administratrix should hold the property without any personal interest in them and solely as a custodian. [9]

However, my ruling is not based upon that, it is based upon the grounds which I have heretofore indicated.

Now, if counsel wish to make a test of the case, which you may well wish to do, by recourse to the appellate court, I will make the formal order as prayed for by committing the defendant for contempt until she produces the books. If counsel, however, do not intend to make it a test case, I will make an order which will require the respondent to produce the books and deposit them with the clerk of this court, where they may remain for examination by the Internal Revenue Agents, with a provision that if the Internal Revenue Agents desire any photostatic copies of any documents that they shall designate them in writing to the clerk and that the facilities of the clerk of the court shall be used at the expense of the Government in the making of photostats of whatever documents they require to have photostated.

Now, it may be that the Internal Revenue Bureau would not want to accept that condition. It may be that the Government would not want to accept that condition.

Mr. Steward: Your Honor, in this case, unlike many other cases, we are not interested in a test case. The only thing we want is the books, and the procedure outlined by the court with respect to having the books and records filed with the clerk is satisfactory to the petitioner.

Mr. Conyers: That will be satisfactory, your Honor. I [10] hardly think we are in a position to deposit our client in jail for the purpose of testing some theory of law.

The Court: If you desire to test it, I would stay the execution of the order until you can get your papers prepared. I do not want to put her in jail this afternoon and put you under the gun of getting a writ releasing her from the appellate court.

Mr. Conyers: I may be too faint-hearted, your Honor, but that had occurred to me, and I wonder if it might be possible for us, rather than attempting to make some of the decisions right on the spot, and perhaps in an excess of cautiousness make a decision we might not want to stand by, it might be easier all around if we might permit a reasonable time to determine whether our interests demand an appeal or whether at this point we might accede to the other horn of the dilemma, and that is deposit the books with the clerk of the court.

The Court: Well, I think that the United States Attorney might prepare an order for my signature granting the petition, committing the respondent

to jail for contempt until she produces the books, which will be stayed until, let us say, February 8—that is next Tuesday—at 12:00 o'clock noon, and it will thereafter be permanently stayed if the respondent deposits all of the books and records with the clerk of this court, where they may remain for examination by both [11] herself and the Internal Revenue Agents at her convenience and at their convenience.

Mr. Conyers: I think that will be fine, your Honor.

The Court: That will give you some time to give some deliberation to the course you would want to follow between now and next Tuesday, and if you decide that you want to test the matter—I am not suggesting that you should or should not——

Mr. Conyers: I appreciate that.

The Court: ——but as a conscientious lawyer you are confronted with the duty of making that determination. However, that will give you sufficient time to do that.

Mr. Conyers: I appreciate that.

The Court: Now, would that be sufficient time?

Mr. Conyers: I believe it would, your Honor; yes.

The Court: Is that satisfactory?

Mr. Steward: Yes.

The Court: And you will agree to such an order?

Mr. Steward: That is very agreeable.

The Court: Very well. You will prepare the order and submit it.

Mr. Steward: Yes, your Honor. I will submit it by this afternoon, or try to.

The Court: In any event, the respondent is present, though the record does not show whether she is or is not. [12]

Mr. Conyers: She is present, your Honor.

The Court: Will she make herself known?

(The respondent rose.)

The Court: You are Evelyn Hubner, the respondent?

The Respondent: Yes.

The Court: You have heard the order of the court?

The Respondent: Yes, I did.

The Court: Do you understand it?

The Respondent: Yes.

The Court: What is it?

The Respondent: I am to deliver the books to the clerk.

The Court: You are to go to jail for contempt until you deliver the books, but the order is stayed until 12:00 o'clock noon, February 8th, and it will thereafter be permanently stayed if prior to that time you deposit and deliver all of the books, records and papers that are called for by the subpoena with the clerk of this court for their subsequent examination by the Internal Revenue Agents and by yourself or anyone that may be designated.

Mr. Conyers: Your Honor, would that stay also apply if by that time notice of appeal has been filed? Would the stay be applicable in that situation if that should happen to be our choice?

The Court: No; I think you would have to get another stay if you file an appeal. [13]

Mr. Conyers: Very well.

The Court: In other words, I want to make the order definite so that it is in a form that is appealable and contestable, and at the same time I do not want to make it unduly onerous and burdensome to present such question. I think that the order in the form that I have announced will preserve the question on appeal and at the same time if compliance is had it will not impose any undue burden on anyone.

Mr. Conyers: Thank you, your Honor.

The Court: Very well. Court is adjourned.

(Whereupon, at 2:30 o'clock p.m., court was adjourned.) [14]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at San Diego, California, this 6th day of February, A.D. 1955.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed March 24, 1955. [15]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 78, inclusive, contain the original:

Petition for Order of Attachment of Person for Civil Contempt.

Order to Show Cause.

Answer to Petition for Order of Attachment.

Affidavit of Jack M. Harrison re Petition for Order of Attachment.

Affidavit of Beatrice E. Hubner re Petition for Order of Attachment;

Affidavit of H. M. Fisher re Petition for Order of Attachment.

Affidavit of Delta M. Boren re Petition for Order of Attachment.

Brief in Opposition to Petition for Order of Attachment.

Brief in Support of Petition for Order of Attachment, etc.

Affidavit of Lloyd M. Tucker.

Affidavit of John L. McIver.

Affidavit of Henry N. Miller.

Findings of Fact, Conclusions of Law and Order;
Lodged Feb. 8, 1955.

Request for Additional Findings and for Amendments to Findings of Fact.

Memorandum.

Findings of Fact, Conclusions of Law and Order.

Stay of Commitment Pending Perfection of Appeal.

Notice of Appeal.

Designation of Contents of Record on Appeal.

Which, together with a full, true and correct copy of the minutes of the Court on Dec. 22, 1954, and Jan. 13, Jan. 21, Feb. 3, and Feb. 8, 1955; and 1 volume of Reporter's Transcript of Proceedings had on Feb. 3, 1955; all in said cause, constitute the Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid by appellants.

Witness my hand and the seal of said District Court this 29th day of March, 1955.

[Seal]

EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14704. United States Court of Appeals for the Ninth Circuit. Evelyn Hubner, Appellant, vs. Lloyd M. Tucker, Special Agent, Internal Revenue Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 30, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14704

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

STATEMENT OF POINTS ON APPEAL

I.

Appellant herewith presents the points on which she claims the District Court erred:

1. That the Court erred in holding that the Appellee was entitled to re-examine books and records in the possession of Appellant without having complied with the requirements of Section 7605 (b) of the 1954 Internal Revenue Code.

2. That the Court erred in holding that no unlawful search and seizure would occur if Appellant is required to deliver her books and records without the Government having complied with the provision of Section 7605 (b) of the 1954 Internal Revenue Code.

3. That the Court erred in holding that the Appellant could not claim the privilege of the Fifth Amendment in refusing to produce the books and records set forth in the Summons.

* * *

SLOANE & FISHER,
ROBERT W. CONYERS,

By /s/ H. M. FISHER,
Attorneys for Appellant.

[Endorsed]: Filed April 8, 1955.

No. 14704

**United States
Court of Appeals
for the Ninth Circuit**

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

FILED

JUN 20 1955

No. 14704

**United States
Court of Appeals
for the Ninth Circuit**

EVELYN HUBNER,

Appellant,

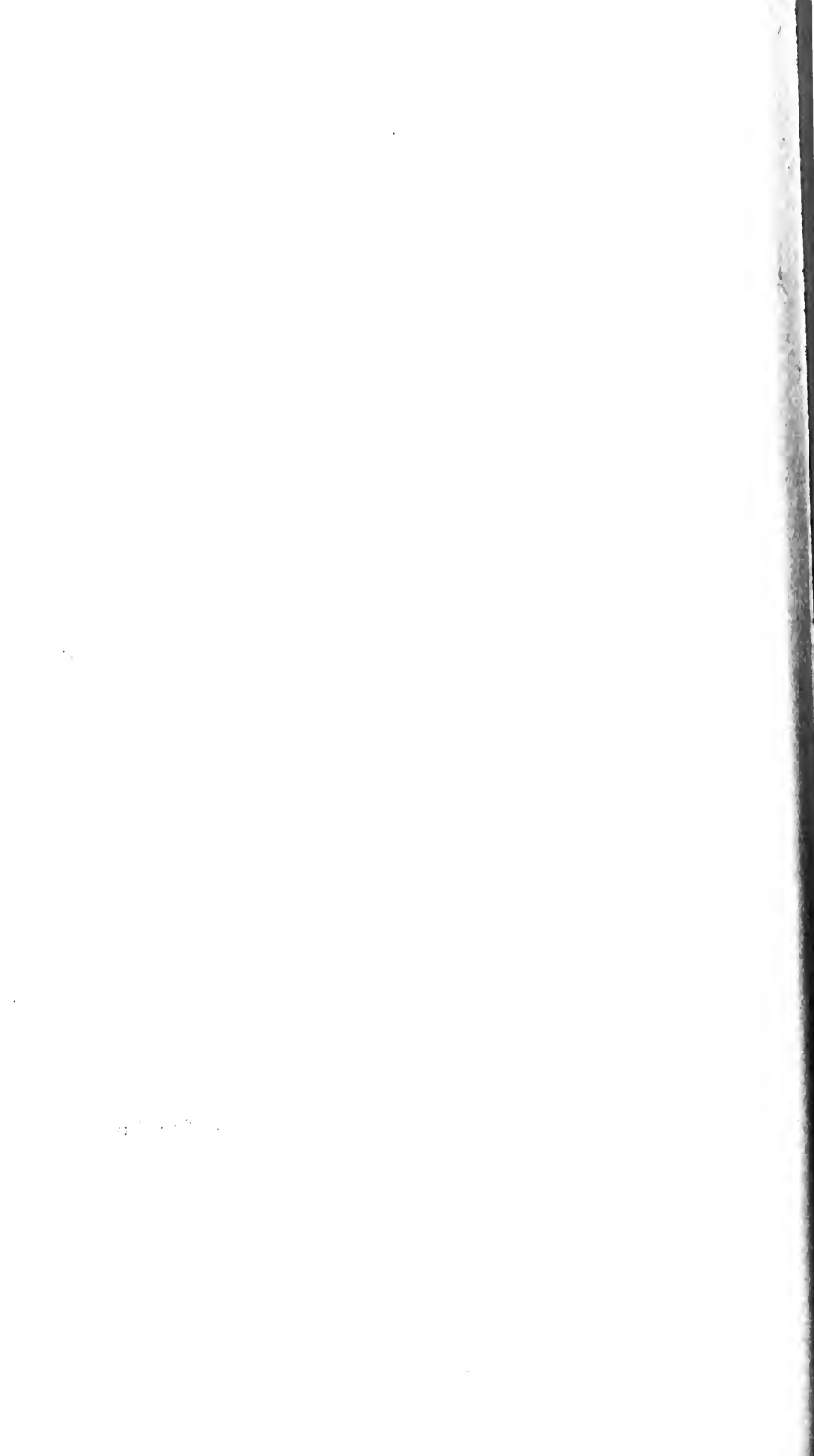
vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

**Supplemental
Transcript of Record**

**Appeal from the United States District Court for the
Southern District of California,
Southern Division.**

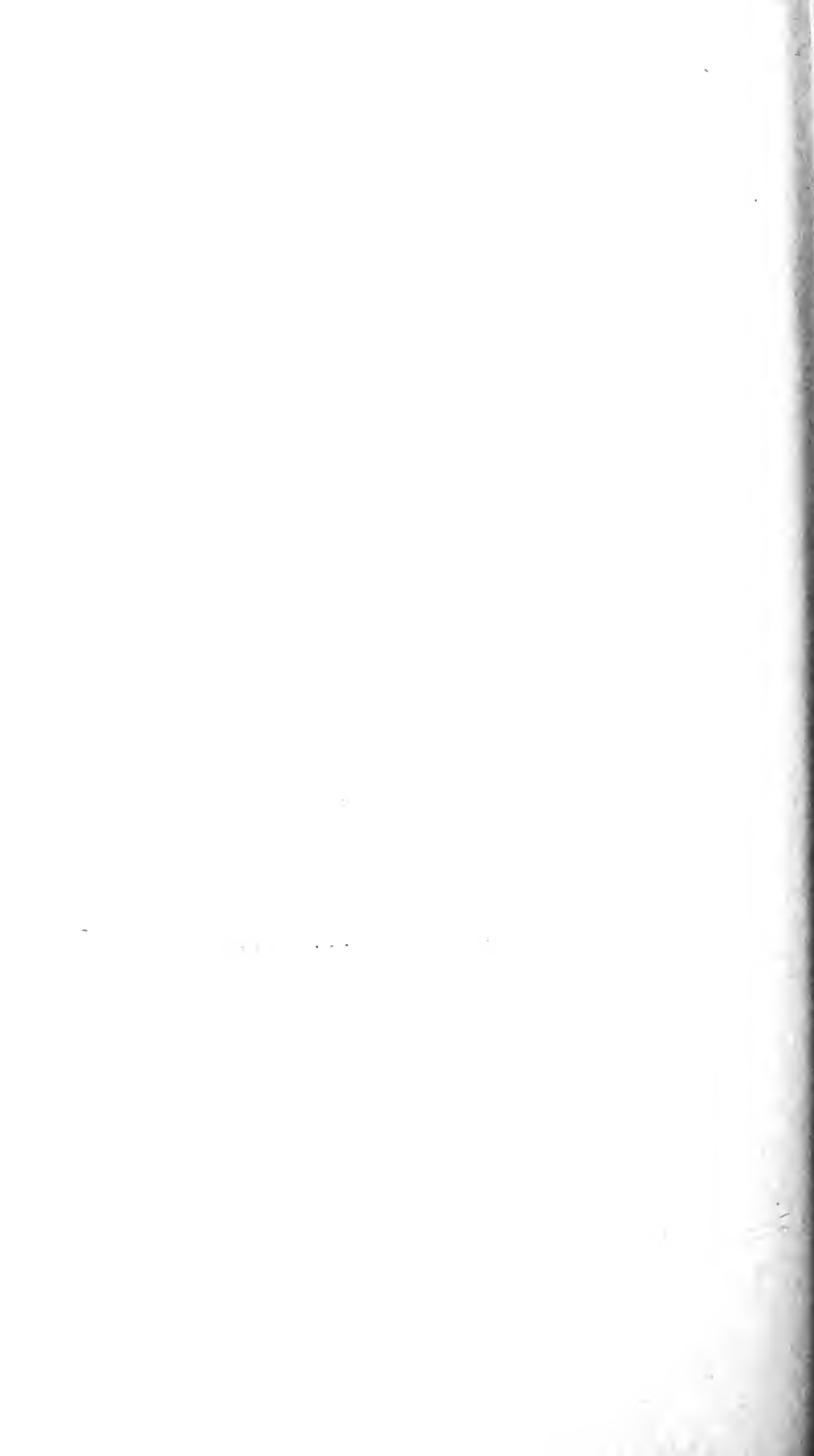


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern
District of California, Southern Division

Civil No. 1691

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Petitioner,

vs.

EVELYN HUBNER,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

The above-entitled cause came on regularly for hearing on February 3, 1955, Laughlin E. Waters, United States Attorney, and Harry D. Steward, Assistant United States Attorney, for petitioner, respondent appearing personally and through her attorneys, Hugo M. Fisher and Robert W. Conyers, and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

Findings of Fact

I.

That petitioner is a duly appointed and acting Special Agent of the Internal Revenue Service and has been authorized by the Secretary of the Treasury to perform the duties of such office and, specifically, the duties referred to in Sections 7603 and 7604 of the Internal Revenue Code, 1954. [50*]

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

II.

That summons was duly issued and served by Lloyd M. Tucker on the respondent, Evelyn Hubner, on November 5, 1954, requiring that she appear before him to give testimony relating to the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951, and 1952, and to bring with her and produce for examination the following books, records and papers at 527 Land Title Building, 235 Broadway, San Diego, California, on the 29th day of November, 1954, at 10:00 o'clock a.m.: Books of Account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company, relating to transactions had by that partnership and corporation with the above-named Clifford O. Boren and Delta M. Boren for the years above stated, together with pay checks, invoices, correspondence and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and the above-named taxpayers.

III.

That respondent, as executrix of the estate of Elmer J. Hubner, had and now has custody of the Books of Account, pay checks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda of the Hubner Building Company, a partnership, and the Hubner Building Company, a corporation, relating to transactions with Clifford O. Boren and Delta M. Boren.

IV.

That respondent did wilfully and knowingly neglect and refuse to obey said summons in that respondent did appear at the time and place set forth in the summons but did not produce said books, records, papers and data.

V.

That respondent resides in San Diego County, California, within the Southern District of California, and that this Court has jurisdiction of this matter under the provisions of the Internal Revenue Code of 1954 and Title 28 of the United States Code, Sections 1340 and 1345. [51]

VI.

That the Hubner Building Company was a corporation from February 14, 1950, to September 30, 1950; that said corporation was dissolved and business was continued as a partnership under the name of Hubner Building Company until the date of its dissolution on June 6, 1951, and its windup and final distribution on February 28, 1953. That said partnership consisted of Elmer J. Hubner, Alton B. Jackson, and Wrelton Clarke.

VII.

That said Elmer J. Hubner intermarried with respondent on May 23, 1952, which marriage was dissolved by the death of E. J. Hubner on January 12, 1954. That the only connection respondent had with or interest in said Hubner Building Company and Corporation was as the wife of E. J.

Hubner, deceased, and in no other capacity, and had no other connection with said Company or Corporation.

VIII.

That the books and records of the Hubner Building Company, a corporation, and the Hubner Building Company, a partnership, were investigated by agents of the Internal Revenue Service which investigation resulted in a final determination of the tax consequences of the corporation and an offer of final settlement of tax liability of the estate of E. J. Hubner, arising out of the operation of the Hubner Building Company, a partnership. That such tax liability is of a civil nature and would be concluded by acceptance of this offer. That no investigation of a criminal nature of the corporation or the partnership or of the estate of E. J. Hubner or the respondent is contemplated by the Internal Revenue Service.

IX.

That the taxpayers under investigation by the Internal Revenue Service are Clifford O. Boren and Delta M. Boren and not respondent, the Hubner Building Company, a corporation; the Hubner Building Company, a partnership; the estate of E. J. Hubner or any other association or individual connected with respondent.

That it has not been shown that respondent could be subjected to any criminal proceedings in connection with any of the books, records and miscellaneous documents which formed the subject matter

of the summons, and it is only shown [52] that she might be subject to some civil liability as a transferee for inadequate consideration.

That sufficient evidence of fraud by the taxpayers Clifford O. Boren and Delta M. Boren has been shown to warrant an investigation at this time. That the taxpayers, Clifford O. Boren and Delta M. Boren, have by written consent extended the statute of limitation with respect to civil liability until June 30, 1955.

X.

That the books and records and other documents as set forth in the summons are material to the investigation of the tax liability of Clifford O. Boren and Delta M. Boren and that an examination of said books, records and other documents by the Internal Revenue Service as set forth in the summons is not an unnecessary examination nor is it unreasonable as to respondent. That investigation of the Borens has been commenced and is not compelled.

Conclusions of Law

I.

That the production of the books and records and documents set forth in the summons will not incriminate respondent under the Fifth Amendment of the Constitution.

II.

That respondent should produce the books, records and documents specified in the summons in accordance with the provisions thereof.

III.

That an attachment against the person of respondent should issue for failure to produce said books, records and documents.

Now, Therefore, It Is Ordered, Adjudged and Decreed that an attachment against the person of Evelyn Hubner as and for contempt should and is hereby issued and the respondent is remanded to the custody of the Marshal, said attachment and commitment being stayed, however, until 12:00 noon, February 8, [53] 1955, with further proviso that said stay of execution shall become permanent if on or before said time and date respondent shall deliver to the Clerk of this Court Books of Account of the partnership, known as the Hubner Building Company and the corporation, known as the Hubner Building Company, relating to transactions had by that partnership and corporation with Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, together with paychecks, invoices, correspondence, and any and all miscellaneous records, data, and memoranda relating to transactions between the Hubner Building Company and Clifford O. Boren and Delta M. Boren.

It Is Further Ordered that upon delivery of these Books of Account, records and other documents that agents of the Internal Revenue Service and agents of the respondent shall have the right at all reasonable times to examine said Books of Account, records and documents and may have photostatic

copies of the same or any portion thereof by designation to the Clerk who shall use the facilities of the office of the Clerk of this Court for making such photostats.

Dated:

.....,

United States District Court
Judge.

Lodged February 8, 1955. [54]

[Title of District Court and Cause.]

MINUTES OF THE COURT—
DECEMBER 22, 1954

Present: Hon. Jacob Weinberger, District Judge:

Counsel for Petitioner:

Howard R. Harris.

Counsel for Respondent: Hugo Fisher.

Proceedings:

On motion of Hugo Fisher, counsel for respondent, no objections by Attorney Harris, Assistant U. S. Attorney, for petitioner, it is ordered that respondent is allowed until January 3, 1955, to file brief; petitioner until January 10, 1955, to file reply brief, and hearing on O.S.C. is continued from December 23, 1954, until January 14, 1955, at 10:00 a.m.

EDMUND L. SMITH,
Clerk. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—
JANUARY 13, 1955

Present: Hon. Jacob Weinberger, District Judge.

Counsel for Plaintiff: Harry D. Steward.

Counsel for Defendant: Hugo Fisher.

Proceedings:

On motion of Attorney Fisher for respondents, joined in by Harry D. Steward, Ass't U. S. Att'y, for petitioner,

It Is Ordered that cause is continued from Jan. 14, 1955, to Jan. 21, 1955, 2 p.m., for hearing pending matters.

EDMUND L. SMITH,
Clerk. [46]

[Title of District Court and Cause.]

MINUTES OF THE COURT—
JANUARY 21, 1955

Present: Hon. Jacob Weinberger, District Judge.

U. S. Att'y, by Ass't U. S. Att'y:
Howard R. Harris.

Counsel for Defendant: Hugo M. Fisher.

Defendant not present.

Proceedings:

For hearing on order to show cause.

It Is Ordered that cause is continued to Feb. 4, 1955, 2 p.m., for hearing on order to show cause.

EDMUND L. SMITH,
Clerk. [47]

[Title of District Court and Cause.]

MINUTES OF THE COURT—
FEBRUARY 3, 1955

Present: Hon. Peirson M. Hall, District Judge.

Counsel for Plaintiff:

Harry D. Steward, Ass't U. S. Att'y.

Counsel for Defendant:

Hugo Fisher and Robert W. Conyers.

Proceedings:

For hearing on order to show cause.

Court inquires whether counsel are willing to submit the matter on briefs already filed and both sides are agreeable.

Court makes a statement and grants petition.

Each of Attorneys Steward and Conyers, respectively, makes a statement.

Court Commits respondent Evelyn Hubner to jail, but execution is stayed until noon, Feb. 8, 1955, and Respondent Hubner is required to deposit all books and records with the Clerk of the Court prior to that time for inspection of all concerned,

photostatic copies to be made by Internal Revenue, if they so desire, and at their expense.

Court directs Attorney Steward to prepare order to such effect.

Respondent Hubner is present and states she understands the decision.

At 2:38 p.m. court adjourns.

EDMUND L. SMITH,
Clerk. [48]

[Title of District Court and Cause.]

MINUTES OF THE COURT—
FEBRUARY 8, 1955

Present: Hon. Peirson M. Hall, District Judge.

Counsel for Plaintiff: No appearance.

Counsel for Defendant: No appearance.

Proceedings:

On the Court's own motion It Is Ordered that further stay of execution of commitment into custody for contempt is allowed until Feb. 18, 1955, noon, on the same conditions as imposed by minute order of Feb. 3, 1955.

EDMUND L. SMITH,
Clerk. [49]

[Endorsed]: No. 14704. United States Court of Appeals for the Ninth Circuit. Evelyn Hubner, Appellant, vs. Lloyd M. Tucker, Special Agent, Internal Revenue Service, Appellee. Supplemental Transcript of Record. Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed March 30, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



No. 14704.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue
Service,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
*Assistant United States Attorney,
Chief, Tax Division,*

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*Assistant United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.*

HARRY D. STEWARD,
HOWARD R. HARRIS,
*Assistant United States Attorneys.
Of Counsel.*

FILED

JUL - 1 1955

PAUL P. O'BRIEN, CLERK



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No. 14704.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal Revenue
Service,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE APPELLEE.

Opinion Below.

The Findings of Fact and Conclusions of Law [R. 70-77] and the Memorandum [R. 58-70] of the District Court are not officially reported.

Jurisdiction.

This is an appeal from a judgment and order that the appellant was in contempt for not complying with a summons issued under the authority of Section 7602 of the Internal Revenue Code of 1954, 68A Stat. 901, by an agent of the Internal Revenue Service requiring the pro-

duction of certain records in connection with the investigation of another taxpayer. Jurisdiction was conferred on the District Court by Sections 7402, 7602, 7603, 7604, 7605 of the Internal Revenue Code of 1954, 68A Stat. 873, 901, *et seq.*, and 28 U. S. C. Sections 1340 and 1345. The Findings of Fact and Conclusions of Law and Order (committing the appellant to the custody of the Marshal for contempt) were entered on February 23, 1955. [R. 70-77] Within 60 days and on February 24, 1955, a notice of appeal was filed. [R. 78] Jurisdiction is conferred on this Court by 28 U. S. C. Section 1291.

Questions Presented.

1. Whether a Special Agent of the Internal Revenue Service may summon the production of a third party's records of transactions between said third party and a taxpayer against whom a fraud investigation is being conducted, when the third party's books and records have already been previously examined for the purpose of determining the said third party's tax liability.
2. Whether compliance with the summons constitutes an unreasonable search and seizure.
3. Whether the appellant could in any way be incriminated by the production of those records and papers summoned to be produced, where they were kept in the course of her husband's business prior to their marriage, and the income for said period was reported on their joint income tax return.

Statutes Involved.

The pertinent statutes are printed in the Appendix, *infra*.

Statement.

On November 5, 1954, the appellee, Lloyd M. Tucker, a Special Agent of the Internal Revenue Service, served a summons on the appellant, Evelyn Hubner, requiring her to appear before him to give testimony relating to the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952, and to bring with her and produce for examination those books of account of the partnership known as the Hubner Building Company and the corporation known as the Hubner Building Company relating to transactions between said partnership and corporation and the aforementioned Clifford O. Boren and Delta M. Boren for the years above stated, together with pay checks, invoices, correspondence and all miscellaneous records, data and memoranda in connection therewith. The appellant, executrix of the estate of her husband, Elmer J. Hubner, who died January 12, 1954, appeared at the time and place set forth in the summons but refused to produce said books, records, paper and data of which she did have custody. [R. 71-72] Accordingly, the appellee, under the provisions of Section 7604 of the 1954 Internal Revenue Code, 68A Stat. 902, through his counsel, the United States Attorney, instituted this proceeding seeking enforcement of his summons. [R. 70-71]

Based on the pleadings, affidavits and memoranda below, the lower court found that from February 14, 1950, to September 30, 1950, the Hubner Building Company had done business as a corporation. Thereafter the corporation was dissolved and business was continued as a partnership under the name of Hubner Building Company until the date of its dissolution on June 6, 1951. The members of the partnership consisted of Elmer J.

Hubner, Alton B. Jackson and Wrelton Clarke. The affairs of the partnership, however, were not finally wound up until February 28, 1953. The appellant here did not marry E. J. Hubner until May 23, 1952, after the dissolution of both the partnership and corporation and was not at any time either a stockholder, director, or officer of the corporation, or a partner of the partnership, or an employee of either. [R. 72-73]

A routine audit had been made by the Internal Revenue Service of the books and records of both the corporation and partnership. This investigation resulted in a determination that the corporation had overpaid its tax for the fiscal year ending in 1950 and that the partnership had under-reported its income for the succeeding period. The examining agent concluded that there was no evidence of fraud with respect to the returns filed by E. J. Hubner reporting his share of the business income. [R. 49-51, 72-73] The appellant and E. J. Hubner had married on May 23, 1952, and filed a joint federal income tax return for the calendar year 1952. In this return was reported E. J. Hubner's distributive share of the partnership income for the fiscal year ended February 29, 1952. [R. 73]

Prior to the marriage, E. J. Hubner had transferred a ranch to the appellant to which the Government may look to satisfy its claim against the estate of E. J. Hubner for the delinquency in tax resulting from the operation of the partnership. However, this liability is of a civil nature. No criminal investigation of the corporation, the

partnership, the estate of E. J. Hubner, or the appellant is in progress or contemplated by the Internal Revenue Service. [R. 50, 74]

However, a criminal investigation of the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950 and 1951 is being conducted and has not been completed based on a preliminary conclusion that an amount in excess of \$40,000 has been omitted as income from the returns of these taxpayers. They have consented in writing to extend the statute of limitations with respect to their civil liability for the year 1950 through June 30, 1955. [R. 47-48, 74-75]

Summary of Argument.

A special agent of the Internal Revenue Service here seeks to aid his investigation of a taxpayer's liability by the examination of the records of a third party's transactions with the taxpayer. The custodian of the third party's records resists such an examination on the ground that those records have already been examined once by the Internal Revenue Service, and on the further ground that to produce the records would incriminate the custodian. The facts before the lower court show, first of all, that the revenue agents who examined the records of the Hubner Building Companies, both partnership and corporation, are not the same persons as the special agent-appellee investigating the criminal tax liability of the Borens. The production of the records and memoranda pertaining specifically to transactions between the Hubner

businesses and the Borens for the years 1950, 1951 and 1952 is not an oppressive request. Based on the conclusion drawn from the prior audit of the Hubner Companies, said records are clearly necessary to a proper determination of the Borens' tax liability.

The procedural requirements of Section 7605(b) relative to a second examination of a taxpayer's books are only applicable where the investigation being conducted is of the owner of the books. It is not pertinent where the books are those of a third party. The taxpayer referred to in Section 7605(b) is the one whose return is under investigation.

The summons issued by the appellee is sufficiently definite and narrow in scope as to be reasonably certain, and compliance therewith would not be oppressive so as to constitute an unreasonable search and seizure.

It is clear that the records and data sought to be examined relate only to those transactions between the Hubner Companies and the Borens for the years 1950, 1951 and 1952. Since the appellant was at no time interested either in the Hubner partnership or corporation as owner or employee, only her husband, who is now deceased, would have had standing to claim the privilege against self-incrimination. The mere fact that appellant executed a joint federal income tax return for the year 1952 in which was included her husband's income from the Hubner Building Company partnership, where the partnership was dissolved prior to the marriage, can in no way give her standing to claim the privilege. The records here sought are not the appellant's personal records; her possession of them is merely that of a custodian.

ARGUMENT.

I.

The Summons on Its Face Satisfies the Requirements of Sections 7602, 7603, and 7605 of the Internal Revenue Code of 1954.

Sections 7602-7605 of the Internal Revenue Code of 1954 are in large part embodiments of corresponding provisions of the 1939 Internal Revenue Code, so that the decisions interpreting the latter are here apposite.

Section 7602 provides that "For the purpose of ascertaining the correctness of any return" an agent is authorized "(1) To examine any books, papers, records, or other data which may be relevant * * * (2) To summon * * * any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax * * * to produce such books, papers, records, or other data * * *." The uncontroverted facts disclose that the returns, the correctness of which is questioned, are those of Clifford O. Boren and Delta M. Boren and that the person having possession and custody of the books and papers to be examined is the appellant. The facts are clear both from the summons and affidavits filed with the lower court that the investigation is in no wise directed toward the appellant, the estate of E. J. Hubner, the Hubner Building Companies, or any concern connected with the appellant. The only returns which are questioned by the appellee are those of the Borens.

The previous examination of the books in the appellant's possession by other agents was conducted with a view toward determining the civil tax liability of the Hubner Companies and E. J. Hubner. That audit was

not at all directed toward the tax liability of the Borens or either of them. The true scope of the instant examination becomes material in view of the written consent executed by the Borens extending the statute of limitations for the assessment of any deficiency in tax for the year 1950 through June 30, 1955. [R. 44-45]

Furthermore, this fact serves to distinguish this case from cases where the Internal Revenue Service decides to re-investigate a case after the statute of limitations has expired, based on a subsequent determination of fraud. *In re Andrews' Tax Liability*, 18 Fed. Supp. 804 (D. C. Md. 1937). When the summons was here served, the statute of limitations had not expired for any of the years under investigation.

Question then arises as to whether Section 7605(b), which was embodied in the 1939 Internal Revenue Code as Section 3631, renders the summons invalid. “* * * the statute [forerunner of §3631] * * * forbids a further examination after one has been made unless the same is necessary, and ‘necessary’ in the context means reasonable; any right of privacy or to be let alone must yield to the reasonable exercise on the part of the Government of its power of investigation in aid of the collection of taxes.” *Zimmerman v. Wilson*, 25 Fed. Supp. 75, 77, *Aff'd*, 105 F. 2d 583 (3rd Cir. 1939).

This Court, in *Martin v. Chandis Securities Co.*, 128 F. 2d 731 (9th Cir. 1942), interpreted Section 3631 as a limitation on the part of the Bureau of Internal Revenue,

in order to prevent unnecessary examinations or investigations. However,

“the facts in this case show that the Hubner Companies had considerable dealings with the Borens, and that there is a possible additional tax liability of the Borens in excess of \$40,000 for the years 1950-1951; that the previous examination of the Hubner books indicated that a full audit of them in connection with the Boren investigation would produce facts bearing upon the possible liability or non-liability of the Borens. The presently requested examination is thus ‘necessary.’” Memorandum of U. S. District Judge Hall [R. 67]. See *Falsone v. U. S.*, 205 F. 2d 734 (5th Cir. 1953), *Cert. denied*, 346 U. S. 864 (1953).

This concept of “necessary” is not indigenous to tax inquiries, but cuts across any governmental investigation in order to prevent invasion of our civil rights by way of fishing expeditions. Thus, this limitation of the statute is merely declaratory of existing law.

The requirement of Section 7605(b) that

“a second or additional examination of a taxpayer’s books can be made only at the taxpayer’s request or on written notification of the Secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens) * * * the ‘taxpayer’ referred to in § 7605(b) is the one whose return is under investigation. It does not mean a third party who, as here, in the final analysis is merely a witness having in her possession evidence con-

cerning the possible tax liability of some other person or persons.” Memorandum of District Judge Hall. [R. 67]

It is inconceivable that an investigation of a taxpayer such as was made of the Hubner Companies would forever bar the Internal Revenue Service from thereafter examining the books and records of the Hubner Companies on matters pertaining to, and solely affecting, the tax liability of one of their customers. The fallacy is patent if one assumes, for example, that a large bank has been audited by the Internal Revenue Service for a certain taxable year, and after such an investigation arrives at a settlement of the tax liability for that particular year. Under the appellant’s theory the Internal Revenue Service would thereafter be precluded from again examining the bank’s books and records not only as they may pertain to the bank’s liability, but also as they may pertain to the tax investigation and liability of all of the bank’s depositors and customers. Such an interpretation would be very strained, and if carried to its illogical extreme, would effectively tie the hands of the Internal Revenue Service.

“The ascertainment and enforcement of tax obligations is not a game in which a false move is to be penalized by a procedural bar of some kind. The only question is whether, under the circumstances, more than one examination is an unreasonable encroachment upon the right to be let alone which the constitution protects.” *Zimmerman v. Wilson*, *supra*, 25 Fed. Supp. at 78.

II.

**Compliance With the Summons Would Not Constitute
an Unreasonable Search and Seizure.**

The appellant contends that the summons contains “none of the reasonable specifications and designations required by the Fourth Amendment.” (App. Br. 11.) Nowhere is it argued wherein the summons is deficient except insofar as Section 7605(b) is concerned. It is clear that the summons specifies with reasonable certainty and particularity what is called for within the meaning of Section 7603, in terms of certain records for certain periods.

The Supreme Court of the United States pointed out in *Brown v. U. S.*, 276 U. S. 134, 142 (1928):

“In *Hale v. Henkel*, 201 U. S. 43, * * * this Court held that a subpoena *duces tecum* requiring a witness to produce all understandings, contracts and correspondence between a corporation named and six different companies, as well as all reports made and accounts rendered by them from the date of the organization of the corporation, and all letters received by the corporation since its organization from more than a dozen different companies, was too sweeping to be regarded as reasonable. The limitation in respect of time embraced the entire period of the corporation’s existence and there was no specification in respect of subject matter; and this Court said that if the return had required the production of all the books, papers and documents found in the office of the corporation, it would scarcely be more universal in its operation, or more completely put a stop to the business of the company. The subpoena here under consideration is very different.

It specifies a reasonable period of time and, with reasonable particularity, the subjects to which the documents called for relate. The question is ruled, not by *Hale v. Henkel*, but by *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 553-554, and *Wheeler v. United States*, 226 U. S. 478, 482-483, 489."

Nor is the case at bar ruled by *Hale v. Henkel*, 201 U. S. 43 (1905).

The demands of the summons do not come near approximating what was requested in *First National Bank of Mobile v. U. S.*, 160 F. 2d 532 (5th Cir., 1947), where over six million entries covering five years would have been examined in order to comply with the summons. This the Court felt was unreasonable. Similarly, a request for entries covering 24 years in *Martin v. Chandis Securities Co.*, *supra*, was considered onerous and unreasonable.

A "search is 'unreasonable' only because it is out of proportion to the end sought, as when the person served is required to fetch all his books at once to an exploratory investigation whose purposes and limits can be determined only as it proceeds. The investigation at bar was no such 'fishing excursion,' it was limited to transactions in the two companies, as to which the Commission already had some evidence of violation of the statute." *McMann v. Securities and Exchange Commission*, 87 F. 2d 377, 379 (2d Cir., 1937). To paraphrase Judge Learned Hand's opinion in this decision: There is no oppression, or evidence of any other motive than a lawful investigation. Unless this subpoena is valid, it is impossible to see how the internal revenue statutes can be enforced at all, or how any wrongdoer can be brought to book. *Ibid.*

III.

The Appellant Has No Standing to Claim the Privilege of Self-incrimination With Respect to the Books and Records Summoned.

The only connection the appellant has with the books and records which the appellee sought to examine, which could conceivably be the basis for criminal prosecution, is that the income from the Hubner Company partnership, of which her deceased husband was a partner, was included in the 1952 joint Federal income tax return which she executed. No portion of this income was community, as the partnership was dissolved prior to their marriage. She was at no time a stockholder, officer, director or employee of the Hubner Building Company corporation or a partner or employee of the Hubner Company partnership. On the state of the record presented by the appellant, she could not be the subject of a criminal prosecution. Only her husband would have had standing to claim the privilege.

The only thing that can be said for her present position is that the papers which the agent summoned could lay the foundation for a civil transferee assessment against her as a transferee for inadequate consideration of assets from an insolvent taxpayer, the estate of her husband.

The fact that her husband may have been guilty of tax evasion, insofar as the partnership income was concerned, would not render her also guilty. The joint and several liability of a joint return is a civil, and not a criminal, matter.

Conclusion.

The judgment and order of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
*Assistant United States Attorney,
Chief, Tax Division,*

ROBERT H. WYSHAK,
*Assistant United States Attorney,
Attorneys for Appellee.*

HARRY D. STEWARD,

HOWARD R. HARRIS,
*Assistant United States Attorneys.
Of Counsel.*

June, 1955.

APPENDIX.

Internal Revenue Code of 1954.

SECTION 7602

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(68A Stat. 901.)

SECTION 7603

SEC. 7603. SERVICE OF SUMMONS.

* * * When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

(68A Stat. 902.)

SECTION 7604(a) and (b).

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) Jurisdiction of District Court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall

have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(68A Stat. 902.)

SECTION 7605(b).

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * *

(b) Restrictions on Examination of Taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(68A Stat. 902.)

Internal Revenue Code of 1939.

SECTION 3631.

SEC. 3631. RESTRICTIONS ON EXAMINATION OF TAXPAYERS.

No taxpayer shall be subjected to unnecessary examinations or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Commissioner, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

(26 U. S. C., 1940 Ed. §3631.)



No. 14704

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, Internal
Revenue Service,

Appellee.

APPELLANT'S OPENING BRIEF

Appeal from the United States
District Court for the Southern
District of California,
Southern Division.

FILED

JUN -1 1955

PAUL P. O'BRIEN, CLERK

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UNITED STATES COURT OF APPEALS

for the

NINTH CIRCUIT

EVELYN HUBNER,)	
Appellant,)	No. 14704
)	
v.)	APPELLANT'S
)	OPENING
LLOYD M. TUCKER,)	BRIEF
Appellee.)	

STATEMENT OF JURISDICTION OF
THE COURT

This action arose in the United States District Court for the Southern District of California, Southern Division, under the jurisdiction granted by Section 7604 of the Internal Revenue Code of 1954; that section gives jurisdiction to the District Court to enforce summons issued by agents of the Internal Revenue Service under Section 7602 of the Internal Revenue Code of 1954. Pursuant to the above sections Appellee issued summons directing Appellant to appear before him with certain records, to testify as to tax liabilities of Clifford O. Boren and Delta M. Boren. (Tr. of Rec. p. 7)

Appellant, claiming certain constitutional privileges, refused to disclose the contents of such records. Whereupon Appellee petitioned the District Court for Order of Attachment of person for civil contempt. (Tr. of Rec. p. 3). After hearing on said

petition the District Court found Appellant in contempt and required the disclosure of the contents of such records. The District Court, the Honorable Pearson M. Hall, Judge presiding, filed its Memorandum of Opinion February 17, 1955, and signed Findings of Fact, Conclusions of Law and Order February 17, 1955, the same being docketed and entered February 23, 1955. (Tr. of Rec. p. 70). The order is final and appealable. (*Chapman vs. Goodman*, U.S. Court of Appeals, 9th Circuit, No. 13904, February 11, 1955).

Appellant filed Notice of Appeal on February 24, 1955. (Tr. of Rec. p. 78). Appellant filed an Appeal Bond in the sum of \$300.00 and a Designation of Record of Appeal. Reporter's Transcript of Proceedings were filed March 24, 1955. The record was prepared by the Clerk of the United States District Court, who filed the same with the Clerk of the United States Court of Appeals for the Ninth Circuit on March 30, 1955. Appellant filed Statement of Points on Appeal in the United States Court of Appeals for the Ninth Circuit on April 8, 1955. (Tr. of Rec. p. 94).

STATEMENT OF FACTS

Appellant is the surviving spouse of E. J. Hubner, who died on January 12, 1954. E. J. Hubner was the President of the Hubner Building Company, San Diego, California. The Hubner Building Company was a corporation from February 14, 1950, to September 30, 1950. Thereafter the Hubner Building Co. was dissolved as a corporation and con-

tinued in business as a partnership until its dissolution on June 6, 1951. The affairs of the partnership were wound up on February 28, 1953. E. J. Hubner was a stockholder in the corporation and a general partner of the partnership.

On August 1, 1951, prior to the marriage of the Hubners, E. J. Hubner transferred to Appellant certain real property in San Diego County known as Big Oak Ranch of an approximate value of \$100,000.00. The transfer was made to Appellant in her maiden name as her sole and separate property. (Tr. of Rec. p. 15, 50).

E. J. Hubner and Appellant married on May 23, 1952, and filed joint federal income tax returns as husband and wife for the year ending December 31, 1952. (Tr. of Rec. p. 15 & 73). Because the fiscal year of the partnership did not coincide with the taxable calendar year of E. J. Hubner and his wife, Appellant, their first joint tax return reported income from the partnership, reflected by the partnership activities and records, from March 1, 1951, through February 28, 1952. (Tr. of Rec. p. 15).

The Bureau of Internal Revenue examined the books and records of the Hubner Building Company after the dissolution of the corporation and adjusted the corporate income tax return. (Tr. of Rec. p. 13 & 73). Thereafter the Bureau of Internal Revenue examined the records of the partnership and the records of E. J. Hubner with particular reference to the taxable years of the partnership ending February 28, 1951, and February 29, 1952, and the co-

ordinate individual returns of E. J. Hubner for the taxable year ending December 31, 1951, and the individual return of Appellant and E. J. Hubner for the taxable year ending December 31, 1952. Such examinations resulted in adjustments for both years. (Tr. of Rec. p. 18 et seq. & p. 73).

During the conduct of these investigations of the Hubner Building Company and of Appellant and E. J. Hubner, the Bureau of Internal Revenue was at the same time investigating the income tax liabilities of the Clifford O. Boren Contracting Co., Inc. and Clifford O. Boren and Delta M. Boren individually.

During these investigations the Bureau of Internal Revenue extracted numerous documents, including checks and invoices, from the records of the Hubner Building Company for the purpose of photostating them. These documents were later returned to the Hubner Building Company files. (Tr. of Rec. p. 14).

After the examinations and investigations outlined hereinabove were completed, two agents of the Bureau of Internal Revenue made statements that there were indications of fraud in the transactions between E. J. Hubner, the Hubner Building Company and the Boren interests. (Tr. of Rec. p. 18, 54).

The Appellant now has in her possession and claims an interest in certain books, records, papers, paychecks, invoices, correspondence and miscellaneous data and memoranda falling within the def-

inition of papers requested by the Bureau of Internal Revenue in the summons which is the subject of this action. Said books and records relate to income received by E. J. Hubner during the years 1951 and 1952, as reported on the joint tax return of respondent and E. J. Hubner for the taxable year ending December 31, 1952. (Tr. of Rec. p. 15, 16).

Without written notice by the Bureau of the necessity of a re-examination of the records in issue, (Tr. of Rec. p. 31, 67), a summons was issued by Lloyd M. Tucker, Special Agent of the Internal Revenue Service, and served by him on Appellant, Evelyn Hubner, on November 5, 1954. The Government through Appellee was and is purporting to investigate certain transactions between the Borens and Hubner Building Company by virtue of which the Borens received in excess of \$40,000.00 in taxable income not included in their returns. (Tr. of Rec. p. 36, 47, 48). The summons required Appellant to appear before Special Agent Tucker to give testimony concerning the tax liability of Clifford O. Boren and Delta M. Boren for the years 1950, 1951 and 1952. The summons also required Appellant to bring with her and produce for examination the books of account of the partnership and corporation known as the Hubner Building Company relating to transactions had by the Hubner Building Company with the Borens for the years 1950, 1951 and 1952, "together with paid checks, invoices, correspondence and any and all miscellaneous records, data and memoranda relating to transactions be-

tween the Hubner Building Company and" the Borens. (Tr. of Rec. p. 7).

Appellant appeared before Special Agent Tucker on November 29, 1954, as required by said summons, but did not produce the books and records requested by said summons on the grounds that the summons was defective and that the production of such records would tend to incriminate her within the meaning of the Fifth Amendment to the Constitution of the United States. This action followed.

THE ISSUES

Our argument is directed to the following issues:

1. Whether the Court erred in holding that Appellee was entitled to re-examine books and records in the possession of Appellant without having complied with the requirements of Section 7605(b) of the 1954 Internal Revenue Code.

2. Whether the court erred in holding that no unlawful search and seizure would occur if Appellant is required to deliver her books and records without the Government having complied with the provisions of Section 7605(b) of the 1954 Internal Revenue Code.

3. Whether the court erred in holding that the Appellant could not claim the privilege of the Fifth Amendment in refusing to produce the books and records set forth in the summons.

ARGUMENT

POINT 1

APPELLANT'S BOOKS AND RECORDS MAY NOT BE EXAMINED BY THE BUREAU UNLESS THE BUREAU HAS COMPLIED WITH THE PRE-REQUISITE MANDATES OF SECTION 7605(b) OF THE 1954 INTERNAL REVENUE CODE. SECTION 7605(b) PLACES A LIMITATION ON THE POWER OF THE BUREAU. IT IS NOT A PERSONAL RIGHT AVAILABLE ONLY TO THE TAXPAYER UNDER INVESTIGATION.

Appellant's contention here involves an interpretation of the word "taxpayer" used in Section 7605(b) of the 1954 Internal Revenue Code, 26 U.S.C.A. 7605(b) (formerly 26 U.S.C.A. 3631), which reads as follows:

"(b) Restrictions on examination of taxpayer — No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

The Ninth Circuit Court, in *Martin v. Chandis Securities Co.*, 128 Fed. 2d 731, said (at 128 Fed. 2d 735) as to the limitation imposed by Section 7605(b) (then Section 3631):

"The question is whether in investigating the return of one taxpayer, the Bureau may in-

vestigate the books of a third person regardless of whether the investigation is necessary or not. In other words, is Section 3631 a limitation on the power of the Bureau, or is it merely a personal right available only to the taxpayer? "We believe it is the former and that the Bureau has no power to make an unnecessary examination or investigation."

Under the terms of the statute the taxpayer is accorded two protections against inquisitorial examinations. First, it must be shown that the examination is necessary and, second, the Bureau must give the taxpayer written notice of a proposed re-examination. In the Chandis case the court was confronted with the first situation wherein the Bureau had not shown the requisite necessity for examination. This appeal is also concerned with the second situation, namely, whether the right of re-examination of a taxpayer's books by the Bureau must be preceded in all circumstances by a written notice. The Hon. Pearson M. Hall, in his memorandum opinion, attempted a distinction as follows: (Tr. of Rec. p. 66)

"... All that the Ninth Circuit held was that where the statute of limitations on the face of the record had expired against the taxpayer under investigation, an examination of the third person's books was not necessary. The examination was prohibited solely on that ground and not because there had been a prior examination."

And, further, at page 67 on the record, Judge Hall ruled that:

“The procedural requirement that a second or additional examination of a taxpayer’s books can be made only at the taxpayer’s request or on written notification of the secretary, applies only to a second examination of the books of a taxpayer whose tax is in question. They do not apply to a case, such as here, where the books are those of a third person (Hubner) and not the books of the one whose tax is in question (the Borens).”

This court has defined the word “taxpayer” in the first phrase of Section 7605(b) to include a third person whose tax is not in question. The opinion of Judge Hall defines the same word “taxpayer”, appearing in the second phrase of the same sentence, to mean only the person whose tax liability is directly in question.

We do not believe that Congress intended the first phrase of the Code section to be a limitation on the power of the bureau and the second phrase of the same sentence of the same section to constitute nothing but a right personal to a taxpayer whose tax liability may be under *formal* investigation.

We believe such a distinction to be unwarranted in the language of the statute and in the face of the general rule enunciated by this court in the Chandis case. This view of the Chandis case was adopted by the United States District Court, Western District of Kentucky, on March 24, 1955, when in the case of *In the Matter of Clarence Wood and Mary L. Wood*,

(U.S. District Court, WD of Ky., No. 2710, March 24, 1955) that court, by way of dictum, said:

“The defendants argue that the Peoples’ Deposit Bank and Trust Company case, *supra*, is not controlling here because the records sought by the Bureau there were not the records of the bank from whom they were subpoenaed, but belonged to individuals who were not parties to the action. We adopt the view of the Court of Appeals of the Ninth Circuit in this regard in holding the real ownership of the documents sought does not determine the statutory authority or lack of authority residing in the Bureau, but that whatever limitations upon the Bureau’s power have been placed in the statute apply to all persons thus subpoenaed.”

POINT 2

AN UNLAWFUL SEARCH AND SEIZURE WOULD OCCUR IF APPELLANT WERE REQUIRED TO DELIVER HER BOOKS AND RECORDS WITHOUT THE GOVERNMENT HAVING COMPLIED WITH THE PROVISIONS OF SECTION 7605(b).

Any contention that the summons itself was a substitute for the notice required by Section 7605 (b) would be unsound. The Internal Revenue Code specifically outlines the authority of the Bureau to proceed by way of summons (Sections 7602 & 7605 (a), 1954 Internal Revenue Code) and the provisions of Section 7605(b) are recognized as additional provisions for and limitations on the right of

the Bureau to act in any manner. (Martin vs. Chandis Securities Co., supra). The requirement in 7605(b) that the Bureau notify "the taxpayer in writing that an additional inspection is necessary" would have named a summons as such a notice in writing had Congress meant so to do.

The requirement of Section 7605(b) of a notice in writing of necessity for an additional inspection must be interpreted in context with the limitations of the Fourth Amendment upon search and seizure, or the Government could altogether ignore constitutional protections by the act of mailing a naked notice containing none of the reasonable specifications and designations required by the Fourth Amendment.

Hale vs. Hinkle,

201 U. S. H3; 26 S. Ct. 370; 50 L. Ed. 652.

Brown vs. U. S.;

267 U. S. 134; 48 S. Ct. 288; 72 L. Ed. 500.

U. S. vs. Medical Society,

26 Fed. Supp. 55 at 57.

The Fourth Amendment to the Constitution of the U. S. reads as follows:

"The right of people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Government's approach in the instant case has revealed that the fraud which it wishes to prove involves a total sum in excess of approximately \$40,000.00. The Government must have arrived at this conclusion from its previous examination of the Books and Records in Appellant's possession. It must have had specific transactions in mind, whether one or many, and specific times and persons and places. Having once examined the books and records with some detail, including the making of photostatic copies, the Government is here in a peculiarly apt position to satisfy the public need for investigation while still satisfying the statutory and constitutional right of the individual to be free from a "fishing expedition" into his private papers.

Appellee has neither complied with the plain language of Section 7605(b) as to the giving of a notice in writing, nor the constitutional protections of the Fourth Amendment inherent in that Section: limitations of "Necessity" on any examination or investigation by the Government. It can hardly be "necessary" for the Government to wander loosely and generally through Appellant's private papers in order to obtain the books, records, papers, checks, invoices, data, and memoranda relating to specific transactions which already are known with particularity to the Government.

POINT THREE

THE COURT ERRED IN HOLDING THAT THE APPELLANT MAY NOT CLAIM THE PRIVILEGES OF THE FIFTH AMENDMENT IN RE-

FUSING TO PRODUCE THE BOOKS AND RECORDS SET FORTH IN THE SUMMONS.

The Memorandum Opinion of Judge Hall denied to Appellant the right to rely upon a privilege against self-incrimination under the Fifth Amendment. The records now sought were the records kept by a partnership of three persons. These records reflected the personal transactions and liabilities of each of the partners. While they were husband and wife, Appellant and E. J. Hubner made out joint tax returns on the basis of these records. (Tr. of Rec. p. 15 & 16). Appellant's personal liability on her tax returns is a reflection of the transactions of the Hubner Building Company from February 28, 1951. The records of the partners are the personal records of each of the co-partners, including E. J. Hubner.

This contention is in conformity with the case of *In Re Subpoena Duces Tecum*, 81 Fed. Supp. 418. In that case one of a number of co-partners was subpoenaed to produce the records of the co-partnership prospective to an anti-trust prosecution. The co-partners, not under subpoena, moved to quash under the Fourth and Fifth Amendments to the U. S. Constitution. The court held that the movants could not claim the privilege under the Fifth Amendment since they were not under compulsion to produce the evidence. The court did, however, hold that the papers were the private papers of the movants, and entitled to protection under the Fourth Amendment. The court said (81 Fed. Sup. 418 at page 421):

“While the right is personal, it is not so limited that more than one person may not exercise it with respect to the same papers or effects. It is only when the group or association of persons is ‘so impersonal in the scope of its membership and activities that it cannot . . . represent the purely private or personal interests of its constituents’ that the right is unavailable.”

If E. J. Hubner had been summoned to produce the papers in issue herein for examination as to his personal tax liability, he would have been in a position to claim the privilege against self-incrimination as to these, his personal papers.

His widow, Appellant herein, now asserts the same privilege for herself as to the same papers relating to her own individual tax liability for the same year on the same tax return to which she was also a signatory.

The only difference between the instant case and the foregoing hypothesis is that the Government is here purporting to be concerned only with the liability of the Borens. It is elementary, however, that the investigation need not be aimed at the witness for him to be entitled to the protection of the Fifth Amendment.

There remains then only an examination of the record to see whether they contain circumstances which suggest that the production of the papers would tend to incriminate Appellant.

Appellee in his brief in support of his petition for contempt, said:

"In addition to the Affidavits of petitioner as aforesaid, the affidavit of Henry Miller has been filed, which shows that in the opinion of Miller and under the provisions of the Internal Revenue policies and procedures an indication of fraud was disclosed during the course of his examination of the transactions between the Borens and the Hubner Building Company." (Tr. of Rec. p. 36).

To support this recitation in his brief Appellee, as petitioner, filed an affidavit by Henry N. Miller, an Internal Revenue Agent who had been engaged in examining the books of the Borens. Miller stated:

". . . and in an effort to determine the accuracy of my audit, I checked certain of the Hubner Building Company books and records pertaining to the Borens. The records that I checked were the cash disbursement journal, cancelled checks, and supporting invoices reflecting payments from Hubner Building Company to the Borens. I thereafter compared these records with the records of the Borens and noted certain discrepancies. These discrepancies, when considered in light of other facts which were available, led me to believe that there were indications of fraud." (Tr. of Rec. p. 53 & 54)

The claimed discrepancy of the Borens is said to be in excess of \$40,000. (Tr. of Rec. p. 36, 47, 48).

While this could reasonably be said to relate merely to possible fraud of the Borens, it is just as reasonable that both parties to whatever transac-

tion to which Henry Miller was alluding, were parties to an attempt to perpetuate such fraud.

If Hubner was a party to the concealing by the Borens of \$40,000, it may well have been that he received an unreported consideration for his participation. If this consideration had been received during the period reported on his 1952 tax return, Mrs. Hubner would be liable on her signature on that same return. Having proved this, nothing would be left for the Government to do except by circumstantial evidence to prove knowledge on Appellant's part and thereby affix to her a criminal liability.

The claimed discrepancy of \$40,000 may be viewed yet another way. The Government at the present moment assumes that the Borens received that \$40,000 shown on the books of Hubner Building Company and failed to report the same. As logical an assumption would be that one of the partners of the Hubner Building Company made appropriate entries in his books showing payments in that amount to the Borens and pocketed \$40,000 himself. If Hubner did not report such income, his wife could be criminally liable on the same hypothesis set forth above.

There are still other hypotheses which the trial court should have examined. Prior to their marriage Mrs. Hubner received a transfer of The Big Oak Ranch from Mr. Hubner. The affidavit of John L. McIver, filed in the trial court on behalf of Appellee, indicates that

“The records reflected that Hubner had expended close to \$100,000 for the ranch and improvements and that it appeared that it was a transfer on wholly inadequate consideration and, as such, respondent (Appellant herein) might be liable individually under existing regulations.” (Tr. of Rec. p. 50).

In the state of the record, would it not be logical to assume that the peculiar circumstances of the transfer indicated that all or part of the value of the ranch was itself unreported income of E. J. Hubner. All that the Government would need prove was knowledge or assistance on the part of Appellant to hide the unreported income of E. J. Hubner.

In a normal situation the court will not presume any wrong-doing when it examines the logic of alternative hypothesis from a given set of facts. When, however, a witness has claimed the privilege not to testify because the testimony sought would tend to incriminate her, we do not believe the above presumption applies. If the judge of the trial court was not satisfied with the record as it stood on its pleadings and affidavits, he should have examined the questioned records *in camera* to satisfy himself that the records did or did not, in fact, tend to incriminate Appellant. No such opportunity was afforded the Appellant.

It is submitted that Appellant's basic, personal rights should not be whittled away with an edge of the Government's convenience. If the Borens are

guilty of fraud, the Appellee must find some means short of Appellant's self-incrimination to prove it.

Respectfully submitted,

Sloane & Fisher

Robert W. Conyers

No. 14704

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, INTERNAL REVENUE
SERVICE,

Appellee.

Appeal From the Judgment of the United States District
Court for the Southern District of California.

Petition of Lloyd M. Tucker, Special Agent, Internal
Revenue Service, for Rehearing En Banc.

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FILED

OC

DEC

PAUL P. O'BRIEN, CLERK

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FOR THE NINTH CIRCUIT

EVELYN HUBNER,

Appellant,

vs.

LLOYD M. TUCKER, Special Agent, INTERNAL REVENUE
SERVICE,

Appellee.

Appeal From the Judgment of the United States District
Court for the Southern District of California.

Petition of Lloyd M. Tucker, Special Agent, Internal
Revenue Service, for Rehearing En Banc.

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit, Mathews and Fee,
Circuit Judges, and Foley, District Judge:*

Lloyd M. Tucker, Special Agent, Internal Revenue
Service, the appellee herein, by and through his attorneys
of record, hereby petitions this Honorable Court to
rehear the above-entitled case, and upon rehearing to
grant the relief prayed for.

On September 21, 1956, this Court set aside the order of the District Court holding Evelyn Hubner in contempt. In so doing, the Court remanded the case to the District Court for further proceedings in accordance with its opinion. In setting aside the order holding the appellant in contempt, and in prescribing the procedure to be followed on remand, we respectfully submit, the Court fell into error.

Since the procedure to be followed on remand is of great importance herein and generally, and the briefs and arguments heretofore considered by this Court did not cover these points, and because, it is respectfully submitted, the procedure set forth in the Opinion is not in accordance with the Internal Revenue laws and the United States Constitution, a rehearing should be granted. A similar question of the procedure to be followed on remand is presented by the Government's petition for rehearing in *Local 174, International Brotherhood of Teamsters v. United States*, Docket No. 14,746, and it is respectfully suggested that rehearing *en banc* be granted in both cases, so that uniform rules of procedure may be laid down after hearing arguments of counsel on the subject.

GROUNDS FOR REHEARING.

I.

The Order Holding Appellant in Contempt Was Supported by a Finding Based on the Evidence That the Books, Records and Other Documents Set Forth in the Summons Were Material to the Investigation and by the Finding, Supported by the Evidence, That the Demands of the Summons Were Reasonable.

This Court correctly held that Internal Revenue Code of 1954, Section 7605(b) did not apply here. (Slip Op. 2.) It also correctly decided that the trial court held a hearing, and carefully considered appellant's contentions. (Slip Op. 5.) It further correctly held that the trial court had the right to order appellant to produce particular identified documents in Court. (Slip Op. 5.)

This Court did fall into error, we respectfully submit, in setting aside the trial court order holding Evelyn Hubner in contempt for failure to comply with the Court's previous order to deliver to the Clerk of the Court the books, papers and documents summoned, thus concluding that the materiality of the books, records and documents summoned was not determined by the trial court. (Slip Op. 4-5.)

Section 7602 of the Internal Revenue Code of 1954, is divided into three subsections, each of which authorizes separate investigative actions by the Secretary of the Treasury or his delegate. Each section, however, sets out the same *alternative* conditions to examination or summons or taking of testimony, that is, each requires that the examination or production of data or testimony be "relevant *or* material." (Emphasis supplied.)

In two places in the Opinion, page 4 of the slip sheet and page 5 of the slip sheet, it is implied that the materiality of the documents in question was not adjudged. The finding of the Court, Finding X [R. 74], is to the contrary. Support for such finding is found in the affidavit of Henry N. Miller. [R. 52.] Under Section 7602(b) a determination of materiality *or* relevancy is sufficient. The finding of materiality, supported by the evidence, satisfied the Code requirement. It goes without saying, a finding of the trial court supported by substantial evidence must be sustained. (*United States v. Star Kist Foods, Inc.*, F. 2d (9 Cir., Sept. 21, 1956).)

The Internal Revenue Code of 1954, Section 7603, states as follows:

“* * * When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.”

In enacting the Internal Revenue Code of 1954 the Congress brought into the 1954 Code without any substantial change a similar provision which for many, many, years was found in Section 3615(d) of the Internal Revenue Code of 1939.

The trial court found [R. 69]:

“The demands of the summons are not unreasonable under the facts of the case before the Court.”

This is a finding of the trial court. [Finding XI, R 75.] We respectfully submit that the foregoing finding of the trial court satisfies the requirement of the Internal Revenue Code and the Fourth Amendment of describing the books and documents with reasonable certainty.

II.

The Proposed Procedure of Requiring the Testimony of a Witness Before Issuing an Administrative Summons Is an Onerous Condition Not Contained in the Internal Revenue Code and Repugnant to Its Letter and Spirit.

Procedurally the method enunciated by this Court (Slip Op. 4) not only imposes “an unreasonable burden on the trial court” (Slip Op. 6) but is repugnant to the letter and spirit of the statutes, the procedure described by the Congress, and a departure from all previous case law.

For example, under Internal Revenue Code, Section 7602(1), the agent may examine books, papers, documents, without summoning anyone or taking testimony. Under Section 7602(2) the agent may summon a person to produce books, etc., and to give testimony. The statute contains no requirement that one precede the other. Moreover, under Section 7605(a) there must be a ten-day notice given the witness before appearance in response to a summons. This Court’s suggested *modus operandi* would require two proceedings with a minimum of ten days wait between each.

The administrative unfeasibility of the procedure outlined by this Court must be pointed out to this Court so that in its wisdom it may seek to reconcile the procedures set forth by Congress with proper respect for the Constitutional rights of third party witnesses.

It is respectfully submitted that this Court has confused the requirement of showing the materiality *or* relevancy of summoned documents contained in Section 7602(1), (2) and (3), with the different requirement of describing with reasonable certainty the documents summoned, contained in Section 7603. We respectfully suggest that the

trial court had adequate opportunity to adjudge the reasonable certainty of the description of the documents summoned and so found. [R. 69 and Finding XI, R. 75.]

III.

It Is Not Necessary to Obtain the Consent of a State Court Having Jurisdiction Over the Administrator of an Estate to the Issuance of an Internal Revenue Summons Directed to the Administrator Because of the Supremacy of the Federal Law Under the United States Constitution.

This Court apparently held (Slip Op. 3-4) that as Evelyn Hubner was the executrix of the estate of her deceased husband the consent of the state court having jurisdiction of probate should be asked before any papers, etc., held by her as executrix could be examined or ordered to be produced.

In support of this proposition, this Court has cited (Note 4, Slip Op. 3) two cases, *McCan v. The First National Bank of Portland*, 139 Fed. Supp. 224, affirmed, 9 Cir., 229 F. 2d 859, and *In re Gorday Garment Co.*, 2 Fed. Supp. 162, affirmed *sub nom.*, *Crocker v. Kay*, 9 Cir., 62 F. 2d 391, certiorari denied, 288 U. S. 615. The *McCan* case properly held that a district court has no diversity jurisdiction of the propriety of a widow's allowance under Oregon statutory probate law. It was an exclusive matter for the determination in Oregon courts of probate jurisdiction.

In re Gorday properly held that a bankruptcy court's summary jurisdiction did not extend to a proceeding to compel an administratrix of an assignee for the benefit of creditors to turn over property in her possession to the trustee in bankruptcy. Neither case, we respectfully submit, has any bearing whatever on the power of the

federal government, under United States Constitution, Article I, Section 8, "to lay and collect taxes."

Under this supreme power, as well as under United States Constitution, Amendment XVI, the Internal Revenue enactments of the Congress are the supreme law of the land subject to no diminution by state action.

For example, state statutes of limitations upon filing claims in probate proceedings must yield to federal supremacy in the Internal Revenue field. (*United States v. Summerlin*, 310 U. S. 414 (1940).)

Likewise, in probate proceedings state laws of priority must give way to federal statutes of priority of taxes in an insolvent estate. (*Estate of Muldoon*, 128 Cal. App. 2d 284 (1954).)

Similarly, state laws promulgating homestead exemptions are of no effect with respect to federal taxes because of the supremacy of the federal taxing power under the Constitution of the United States. (*United States v. Heffron*, 158 F. 2d 657 (9 Cir., 1946), cert. denied 331 U. S. 831.)

Similar principles are enunciated in administrative summons cases dealing with state enactments of testimonial privilege. In *Falsone v. United States*, 205 F. 2d 734 (5 Cir., 1953), the Court of Appeals for the Fifth Circuit held that a state enacted accountant-client privilege had no force or effect on an internal revenue summons. In the case of *In re Albert Lindley Lee Memorial Hospital*, 209 F. 2d 122 (2 Cir., 1953), the Second Circuit held that state statutes of privilege would not bar an Internal Revenue summons with respect to hospital records.

In case after case, the United States Supreme Court has enunciated the principle of supremacy of federal law

in the field where state statutes and federal internal revenue law conflict. (*United States v. Security Trust and Savings Bank of San Diego*, 340 U. S. 47 (1950); *United States v. Acri*, 348 U. S. 213 (1955); *United States v. London & Liverpool & Globe Ins. Co.*, 348 U. S. 217 (1955); *United States v. Scovil*, 348 U. S. 220 (1955); *United States v. Colotta*, 350 U. S. 808 (1955); *United States v. White Bear Brewing Co., Inc.*, U. S. (Apr. 9, 1956).)

The impracticality of the announced rule is demonstrated by the obstacles that could be thrown into all investigations and proceedings in federal courts were it to be widely adopted. No longer would a federal court subpoena reach records of any state, county or city. By devices such as receiverships, guardianships and other estates coming under state jurisdiction, taxpayers could surround their affairs with a cloak of immunity, only to be pierced if at all, by long and expensive proceedings through the many trial and appellate courts of the forty-eight divers states.

Conclusion.

To summarize, the appellee urges this Court to reconsider the adequacy of the trial court's determination of the materiality and sufficiency of the subpoena and affirm the court below.

In any event, appellee respectfully urges this Court to reconsider and eliminate from its opinion any state law strictures on Internal Revenue investigations and any instructions as to procedure on the summons to produce books and records which are unworkable and at variance with the statutory and case law and which impose oppressive burdens on investigative agencies and the district courts.

Prayer.

Wherefore, the appellee prays that this Honorable Court grant his petition for rehearing *en banc* with reargument of the case if deemed advisable by the Court, and that it affirm the decision below.

Respectfully submitted,

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October 19, 1956.

Certification.

It is hereby certified by counsel for the appellee in the above-entitled case that this petition for rehearing is presented in good faith and in his judgment it is well founded because of the importance of the issues involved to the proper and efficient administration of the internal revenue laws, and in nowise is it interposed for the purposes of delay.

EDWARD R. McHALE,
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Chief, Tax Division,
Counsel for Appellee.

October 19, 1956.

No. 14,705

IN THE

United States
Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,

Appellant,

VS.

BRADLEY MINING COMPANY,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the
District of Idaho, Southern Division

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No. 14705

IN THE

United States
Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,

Appellant,

vs.

BRADLEY MINING COMPANY,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the
District of Idaho, Southern Division

SUMMARY STATEMENT

On July 12, 1951, plaintiff and appellant, United Mercury Mines Company, an Idaho corporation, commenced this action in the United States District Court for the District of Idaho, Southern Division, against Bradley Mining Company, a California corporation, defendant and appellee. The complaint was founded upon an instrument dated December 31, 1941 (R. 12 ff) and provided for the payment of royalties upon minerals extracted by appellee from property conveyed to appellee by appellant. The conveyance provided three methods for the computation of royalties based on

“net smelter returns”, “net revenue” and “net mint returns”. Some years after the execution of this conveyance, appellee built its own smelter and the present action arises because of contentions of appellant as to the method to be used in computing royalties upon concentrates processed by appellee’s smelter.

The royalty computation provisions in the agreement between the parties referred to herein are as follows (R. 17, 18):

“By net smelter returns, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted.

“By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho.

“By net mint returns, as used herein, is meant the amount paid by any United States Mint, branch or agency thereof, less all shipping and marketing costs from Cascade, Idaho.”

Related to the foregoing is the following provision:

“Should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho, then there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works.”

Appellant’s complaint (R. 3 ff) requested an interpretation that the “net revenue” clause should be the basis for

royalty computation without regard to smelting charges and costs.

Appellee's answer—and affirmative defense (R. 41 ff)—alleged that the royalty computation should be based on the “net smelter returns” provision; that appellee had constructed the smelter at a cost of more than \$2,000,000.00; that appellee was entitled to “deduct its normal smelter charges” as provided in the agreement, and that to adopt appellant's interpretation of the agreement would unjustly enrich appellant.

On October 10, 1952 (R. 136-140) and on April 9, 1954 (R. 164-166), in connection with certain proceedings hereinafter more fully referred to, the trial court in its two memorandum decisions ruled against appellant's claimed interpretation of the royalty provisions and rejected the “net revenue” clause as the controlling basis for royalty computation.

Thereafter, at a pretrial conference (R. 197-221), duly noticed and held on February 1, 1955, the trial court reiterated and affirmed its earlier interpretation and rulings, thus disposing of the only pending issue of law (R. 199, and see admission by appellant in its brief, page 4). As the transcript of the pretrial conference will disclose appellant not only stated that it had but one theory for proving its case (already rejected by the trial court), but also elected not to reserve any questions of fact for a trial. Accordingly, the trial court rendered a judgment of dismissal (R. 189).

STATEMENT OF THE CASE

It is respectfully suggested by appellee that the statement of the case as it appears in appellant's brief ignores or obscures the controlling facts in the record brought here for review. Appellee, therefore, is unwilling to accept the state-

ment as presented by appellant, and elects to set forth what it hopes will be a concise and consecutive statement of the facts, and the occurrences as they took place in the lower court.

From 1927 until December 31, 1941, appellant was the owner of certain mining claims in the State of Idaho. During all of those years appellee and its predecessors in interest, occupied and possessed said mining claims under a series of agreements with appellant, which permitted the mining of said property by appellee in consideration of the payment by it to appellant of certain specified royalties (R. 53).

During those years the material mined from the property was and continues to be low grade gold ore and low grade antimony ore. The ore so mined was concentrated upon the ground and the concentrates resulting were then shipped and sold to smelters. Concentrates valuable principally for their antimony content were sold to antimony smelters, and concentrates valuable principally for their gold content were sold to gold smelters (R. 58, 59).

Sums received by appellee for such concentrates were deemed by the parties to be and were treated as bases for computing royalties payable to appellant by appellee (R. 63).

On December 31, 1941, a new agreement was entered upon between appellant and appellee. That agreement, attached to appellant's complaint, as Exhibit I, appears in the record beginning on Page 12. It is the basis for appellant's claim for recovery in this proceeding. By the terms of that agreement appellee became the owner of the mining claims described therein subject to the obligation to pay royalties to appellant for a period of 999 years in the amounts and upon the terms and conditions in said agreement specified.

Those specifications will be made the subject of detailed discussion later herein.

Following December 31, 1941 and until August of 1949 business continued between the parties to said agreement substantially as before. Appellee continued to mine low grade ore, to concentrate the ores and to ship the concentrates to smelters and other purchasers as the values in the concentrates might dictate. Upon receipt of smelter returns royalties were computed and paid by appellee to appellant. No claim is here made that anything is due from appellee to appellant on account of anything occurring prior to August of 1949.

Concentrates shipped by appellee to antimony smelters contained some gold, and likewise concentrates shipped to gold smelters contained some antimony. Both types of concentrates contained some impurities which somewhat complicated the smelting processes and resulted in the assessment of penalties against the product. Gold smelters would not pay appellee for the antimony content of gold concentrates, and antimony smelters would pay little or nothing for the gold content of antimony concentrates. Antimony smelters insisted upon high grade concentrates thereby setting standards which it was difficult for appellee to meet. The foregoing circumstances limited the amount of saleable products by appellee and also reduced the returns from ores mined and sold, and consequently reduced the royalties payable (R. 60, 61).

Accordingly in 1948 appellee designed a smelter which it was thought could treat both gold and antimony concentrates, and thereby avoid the loss of gold in the antimony concentrates and the loss of antimony in gold concentrates, and which could handle the product of the mine and concentrator even though concentrates might be of a lower grade

than would be acceptable to outside smelters. Such a smelter was built upon the mining property and was put into operation in August of 1949. The cost of constructing the smelter exceeded \$2,000,000.00, all of which was paid by appellee. The cost of operating the smelter exceeds the sum of \$100,000.00 per month, all of which has been paid by appellee. The smelter is referred to in the record as the Yellow Pine (R. 61 ff).

The Yellow Pine went into service in August of 1949 and continued to operate until after this suit was filed. During that time it treated substantially all antimony concentrates produced upon the property, and a portion of the gold concentrates. Gold concentrates beyond the capacity of Yellow Pine were sold to a Tacoma, Washington, gold smelter. Dollarwise the total concentrates treated in Yellow Pine represented 55% of total production, and those sold to outside smelters represented 45% (R. 147, 8).

After Yellow Pine went into operation appellee continued to compute and pay royalties upon gold concentrates shipped out for treatment exactly as before. It paid to appellant 5% of net returns received by it from the smelters (R. 148). As to antimony concentrates and gold concentrates treated in the Yellow Pine smelter, appellee determined what such concentrates could have been sold for to outside smelters and computed and paid royalties upon that basis. This was the same basis followed by appellee in the computation and payment of royalties prior to that time except that after Yellow Pine went into operation certain transportation charges which had theretofore been deducted before computation of royalties were no longer deducted (R. 65).

Royalties so computed and paid were accepted by Appellant until about the time this suit was filed (July 12, 1951).

About a year prior to the commencement of the action, on July 20, 1950, the parties hereto entered upon a supplemental agreement postponing the payment of royalties (R. 66). That agreement contains this significant statement (R. 67):

“Whereas, the said Bradley Mining Co., on the 20th day of June, 1950, paid the United Mercury Mines Company * * * the royalties due for the month of May 1950.”

The foregoing was recognition by both parties that appellee was and had been computing and paying royalties in accord with the requirements of the contract of December 31, 1941, now relied upon by appellant.

In July of 1951, appellant filed its complaint in this action (R. 3-12). To its complaint appellant attached a copy of the agreement of December 31, 1941 as Exhibit 1 (R. 12-26). By its complaint appellant claims that it is entitled to have and receive royalties computed at 5% upon the amount of net smelter returns received by appellee for concentrates shipped away for smelting. Upon concentrates treated in Yellow Pine, appellant claims that it is entitled to have as royalties 5% of all amounts received by appellee for the sale of metals resulting from the smelting process without any allowance whatsoever to appellee for the cost of constructing, operating and maintaining the smelter (R. 11). Thus appellant claims the right to have royalties computed upon one basis if concentrates are shipped out for smelting, and on an entirely different basis if they are smelted in Yellow Pine.

It is important to note and bear in mind the prayer of appellant's complaint, paragraphs 1 and 2 of which read (R. 11, 12):

“That the Court interpret the provisions of said contract exhibit 1, and enter its decree herein determining and decreeing that the proper and legal method for determining the amount of royalty due plaintiff under said contract for minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter of the defendant is by the use of ‘net revenue’ as defined in said contract.

“That the Court determine and declare that it is the duty of the defendant under said contract to furnish plaintiff the amount paid by purchasers from the sale of minerals, ores, metals and values extracted from said mining claims and smelted at the Yellow Pine smelter and the marketing and shipping costs from Cascade, Idaho.”

The principal relief prayed for is declaratory, interpretation and construction of the agreement.

Responsive to the complaint appellee filed its duly verified answer and a motion for partial summary judgment. (R. 41 and R. 51). The motion was supported by Affidavit (R. 114) as provided by Rule 56. Appellant filed a counter affidavit (R. 114) and the motion was submitted for decision.

The Court overruled the motion for summary judgment, but, responsive to the prayer of appellant’s complaint and appellee’s motion, he did construe and interpret the contract. The trial court’s memorandum decision of October 10, 1952, contains this:

“The plaintiff claims that Bradley intended by this contract to assume not only all expenses incurred in the operation of the mine and mill, but the costs of smelting as well in event it constructed a smelter at the property. This I surmise is an afterthought on plaintiff’s part. On consideration of the contract, as a whole, I find no sufficient reason for believing that either party intended that the Bradley Company was to shoulder the cost of smelting in event it constructed a smelter on the

ground, or, to put it another way, that the parties understood that the royalty would in such circumstances be computed under the net revenue clause, as Mr. Oberbillig's Company now contends. In my opinion certain language in the definition of the term "net smelter returns" precludes the existence of such an understanding even though the language is vague when read in the light of the practice." (R. 138)

Here was a clear interpretation of the agreement relied upon by appellant and clear rejection of appellant's contention that it is entitled to have royalties computed upon concentrates treated in Yellow Pine upon the basis of sums received by appellee for the sale of metals resulting from the smelting process. Then as now, however, appellant refused and now refuses to admit that the agreement relied upon by it has ever been construed by the trial court.

Following the memorandum decision above referred to, appellant served and filed request for admissions (R. 141), and also served and filed upon appellee certain written interrogatories (R. 149). It also filed its motion praying for production and inspection under Rule 34 (R. 156). Appellee made answer to some interrogatories; to others it filed objections (R. 151, 153).

Some interrogatories sought to elicit from appellee whether appellee had sold the finished products of Yellow Pine smelter, to whom sold, and the amount received from the sale of such products. The court having, on October 10, 1952, construed the contract as not requiring settlement upon the "net revenue" basis contended for in appellant's complaint, appellee filed its objection to the questions just referred to and filed its motion for an order limiting the scope of order for production, etc. (R. 160). Appellee's motion was made upon the ground that what it sold the end products of the smelter for was immaterial in view of

the court's construction of the agreement. The materiality of the information sought was argued to the court, and following argument the court rendered its memorandum decision of April 9, 1954, which reads (R. 164):

“MEMORANDUM DECISION

Healy, Acting District Judge.

“The matters before the court are objections to certain interrogatories directed to the Bradley Company, and a motion on its part for a protective order limiting the scope of an inspection of records desired by the plaintiff. Specifically, the interrogatories call for information as to the amount and content of products shipped and sold after reduction by the Yellow Pine smelter; the amounts of money received from the sale thereof; the names of the purchasers; and the marketing and shipping costs connected with the sales. The objection urged is that the information is immaterial in view of the court's earlier ruling as to the inapplicability of the ‘net revenue’ clause in the determination of the royalty payable in such situations.

“It should be understood that that ruling, made in October 1952, represents this court's settled interpretation of the contract. To put the matter more concretely, the contract affords no ground for believing that the parties intended to saddle solely upon the Bradley Company the cost of smelting in event Bradley should construct a smelter of its own at the mine and process or reduce there some or all of the concentrates, instead of shipping them as theretofore to a custom smelter. I think it clear that smelting costs were intended by the parties to be deducted before arriving at the amount upon which the royalty of 5% was to be computed, regardless of whether Bradley or some concern independent of Bradley did the smelting. As a necessary corollary, it would appear that the Bradley Company, in determining such costs, is entitled to take into

account all items or factors which would normally be taken into consideration by an independent or custom smelter in arriving at the amount of its charges or at the amount it will pay for concentrates shipped to it for smelting.

“Bradley has contended that the proper basis for computing the royalty in those instances where the concentrates are reduced at its Yellow Pine smelter instead of being shipped and sold to an independent smelter is the value of the concentrates at the mine. Further reflection leads me to believe that recourse to this basis may afford a closer, and at the same time a simpler, approximation to what was intended by the parties than any other they might devise. Nevertheless, another appropriate method would be to determine the cost of processing the concentrates at the Yellow Pine smelter, keeping in mind that Bradley as the owner of the smelter is entitled to have the status of an independent concern in a competitive field, and to determine its charges accordingly. The deduction of those charges from the amount realized by Bradley from the sale of the refined product would give the net sum upon which United’s royalty is to be computed. Theoretically it would seem that recourse to either of the two methods should produce the same result.

“I think, therefore, that the information sought by United may have materiality, and the objections to the interrogatories and request for inspection are accordingly disallowed.

[Endorsed] : Filed April 9, 1954.”

Following the above order, appellee made full compliance therewith. It answered all interrogatories and made all of its books and records available for inspection and copying. Appellant elected not to avail itself of the opportunity to inspect appellee’s records or make any copies thereof.

Next and final occurrence of importance in the court below was the pre-trial Conference. The conference was called by the court pursuant to Rule 16, Federal Rules of Civil Procedure, and the parties were directed to be present by their counsel (R. 187). The purpose of the pre-trial conference, as in all cases, was to simplify the trial of the cause.

We earnestly submit that appellant's brief refuses to recognize what occurred at the pre-trial conference. Appellant, at the pre-trial conference, was at full liberty to reserve questions of fact for the trial, but it clearly elected not to do so and left the record so that there was nothing left for the court to do but to order a dismissal.

The only issue of law ever tendered by appellant was the meaning of the agreement of December 31, 1941, insofar as that agreement relates to the computation of royalties. That issue had been settled by the court by its memorandum decisions of October 10, 1952 and April 9, 1954. The interpretation put upon the contract by those two decisions of the court was re-affirmed and re-stated at the pre-trial conference.

During the pre-trial conference, appellant procured from appellee an admission as to freight and commission charges applicable to smelter products sales (R. 203, 4). The amount of gross sales had already been admitted (R. 166, 167). Under appellant's theory, as clearly stated to the court, these admissions left no issue of fact to be decided upon the trial.

The transcript of the pre-trial conference is preserved in the record (R. 197-214). What occurred there can be more quickly and clearly shown by quotation than by explanation. After preliminary statement the following occurred upon the pre-trial (R. 204-221).

“Mr. Breshears: I have this suggestion to make. As counsel has said, we understand that this Court has now construed the contract to mean that royalties are payable on the basis of net smelter returns, and that Bradley is entitled to be treated as an independent smelter, and deduct normal smelter charges. It seems to me that the first thing to be clarified here now in this conference is whether or not the plaintiff is going to insist upon proof as to whether or not we have properly computed and paid royalties on a net smelter basis. Their answer to our request for admissions denies that we have properly paid on the basis of the computations on our own books. They have had an opportunity, if your Honor please, to examine our books, but have rejected that opportunity. They have an order of court that has been in the files for many months. They were orally offered an opportunity to inspect the books at the last time the Court was here. Now the issue of fact that will have to be established at a trial will be, if they deny that we have paid royalties on the basis of net smelter returns—then the question of fact must be tried out, but it seems to me that they must answer the Court here now and answer us whether that is an issue in fact. If they don’t deny that, there is nothing left in this lawsuit but a judgment in favor of the defendants.

“The Court: Of course, the proceedings in this case heretofore have been more or less informal. We might well have placed in the pre-trial order formally the ruling of the Court on the issue of law, which I understood to be the chief issue in this case, that is the construction of the contract. It seems to the Court that its interpretation of the contract is about as clear language as you can make it. Now there may be other questions of law, if there are it hasn’t shown up so far. From here on it looks to me more or less like a matter of proceedings for an accounting.

“Mr. Ray: If we may suggest it, we would like very much to have your Honor rule on the construction of the contract as part of the pre-trial proceedings.

"The Court: I think it should be done, so it is formally in the record. That doesn't deprive the plaintiff in this case of his right to review that construction of the contract on appeal, but insofar as the District Court is concerned, that is water over the wheel. That can only be raised in an appeal in an appropriate way from the judgment that is finally entered. So it may be that there are other questions that exist, but it seems to me, that I would like to get counsel's views on that, that this is from here on really largely a matter of accounting.

"Mr. Breshears: Doesn't that depend on the question of whether or not they admit or deny whether we have paid properly on the basis of net smelter returns?

"The Court: Of course, the Court is not familiar at all with these interrogatories, or what the answers have been. The Court has had nothing to do with those. No objection to those, as I understand it, and they are in the record here. I haven't gone through them.

"Mr. Breshears: Perhaps I haven't made myself clear. At this pre-trial conference, don't we eliminate the things that are unnecessary and formulate the issues on the basis—irrespective of what the responses to the admissions are, and the interrogatories—if they admit that we have paid, the lawsuit is over, if they have admitted we have paid on the basis of net smelter returns. If they deny it, then we are to put to our proof upon that single question of fact.

"The Court: What about that, what is your answer to that?

"Mr. Clemons: If your Honor please, as I see it there are two possible means that you indicated that the defendants might submit proof, as I read your last memorandum. One was that they compute as they had alleged they have computed. In other words, they say we have computed net smelter and paid you on the same basis other smelters are computing net smelter

and paying you. I think that is one basis, that is the basis they claim they have paid. The other basis your Honor spoke about was to take the gross receipts and deduct from its reasonable smelting costs.

“The Court: I don’t think the Court ever said anything about reasonable smelting costs.

“Mr. Clemons: Is entitled to have and determine its charges accordingly—I believe that is the way—determine its smelting costs and deduct those. Now those are the two alternatives the Court said that exist. So, I don’t know which one they are going to prove. I am not in a position to know myself whether or not they have correctly proven these matters—correctly reported these matters. So I think that that burden is upon them.

“Mr. Ray: May I suggest, your Honor, that the burden of proof is on the plaintiffs in this case. Now under the ruling of the Court, if upon the trial of this case he should offer evidence on the net revenue provision of the contract, the evidence would be rejected as immaterial. Now if he doesn’t claim that our computations are wrong on either of the methods he just referred to, if he doesn’t dispute that we have computed and paid on the net smelter returns, then there is nothing left in the case. If he says that there is an issue, if he denies that our accounting is correct under any method, then you would have that issue left to try.

* * * * *

“The Court: Just a moment. As regards this matter of computation on the royalties on the basis of the market value of the concentrates at the mine. I take it that the plaintiff has not admitted that you have paid the royalty on that basis.

“Mr. Ray: That is what we want to find out, if they do or do not.

“The Court: What about that, Mr. Clemons?

"Mr. Clemons: I will have to admit that they have paid us royalty. The basis upon which they have paid them, I am not prepared to admit that is the same basis that anyone else would pay. I don't know, so I cannot admit that. We know they have paid us money, yes, but as to how they have computed it, I don't think that we should be required to admit it is proper and correct way of computing it, or that it is proper at all.

"Mr. Ray: How do you propose to prove your case then if you can't either admit or deny that our computations are right? The burden is upon you. How do you propose to present your case? We would like to know so we can meet it, if you have one.

"The Court: Do you consider you have no burden of going forward at all with that proof? You are asking a money judgment here.

"Mr. Clemons: That is right, your Honor.

"The Court: As well as declaratory relief.

"Mr. Clemons: That is right. I would propose the case be proven by showing the gross amount received by Bradley Mines upon the sale of the products that went through the smelter, and from that show the deduction of freight and marketing costs, and show the amount that has been paid to us, as establishing the amount we would be entitled to.

"The Court: In other words, you think your burden is to go ahead now and establish the amount of your recovery upon the basis of your construction of the contract which the Court has rejected; is that right?

"Mr. Clemons: Yes, your Honor. I don't know of any other basis you could proceed upon. The defense would be entitled to put in their proof then.

"Mr. Ray: Then we should like to know, your Honor, whether plaintiff intends to make any proof on any other basis.

"The Court: I think that is a fair question.

"Mr. Clemons: I don't know whether I am prepared to answer that, your Honor. I thought I had—I don't know whether there would be any other theory or not myself. I have not discussed with my co-counsel on that, or with Mr.—

"The Court: One of your obligations in these matters is to prepare yourself.

"Mr. Clemons: Yes, I had attempted to, your Honor. That is the theory as I would know it, to state whether there was any other theory or not. I am just not prepared. I don't know.

"The Court: Well, it is your conception of the case that you are entitled to go ahead now on the basis of the allegations of your complaint as though your construction of the contract had been accepted, and you would make proof along that line. Is that your idea of trying this case?

"Mr. Clemons: Yes, your Honor, I would say that was our idea in trying the case.

"The Court: On that basis the evidence you offered would be rejected by the Court as immaterial and irrelevant.

"Mr. Clemons: That would be our theory of the trial as I understand it.

"Mr. Ray: Then we are to understand you would offer proof on that basis and no other basis?

"Mr. Clemons: Mr. Ray, that is the only basis I have in mind at this time. If there is another basis, I am not aware of it, but I would hate to bind ourselves at this time that that is the only theory.

"The Court: In other words, you still adhere to the theory that you are entitled to have royalties paid based on the net revenue clause of the contract.

“Mr. Clemons: Yes, we would answer that in the affirmative, your Honor.

“The Court: So then you are prepared to accept a non-suit so far as this case is concerned, is that right, or dismissal?

“Mr. Clemons: Before I would answer that could I have a few minutes with my client, and I would also like to make a telephone call.

“The Court: We will be in recess until 11:30, is that long enough time?

“Mr. Clemons: I hope it will be.

“The Court: Or we can adjourn until one o'clock, until you get this matter settled in your mind. You might discuss it with your associates, you have several other lawyers in the case.

“Mr. Clemons: Yes, they were not available for today. Then with your permission I would ask that we continue this until one o'clock.

“The Court: All right, we will recess until one o'clock. (Whereupon a recess was taken.)

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* * * * *

“Mr. Clemons: Before recess the Court requested me to advise the Court as to the theory upon which this case will be tried by the plaintiff. I had expressed the view—my understanding of how the case would be presented, to which your Honor said that was a net revenue theory, which it is ostensibly, and I was asked if I had any other theory. I might say to the Court at this time, I have checked with my co-counsel and I am authorized to say that that is the theory as stated by me which would be the theory upon which we would present the case.

“Mr. Ray: Are we to understand then from your statement upon the trial that you would not offer any evidence upon any other theory?

"Mr. Clemons: We would not offer any evidence in the trial of any smelting costs, or any costs other than those which I outlined this morning.

"Mr. Ray: This morning you said upon the trial you would introduce your contract, show what we received from the sale of the end products, you would deduct the freight and sales expenses, and ask the Court to arrive at the royalty by multiplying that result by five per cent.

"Mr. Clemons: And giving credit for what we have received.

"Mr. Ray: And you will offer no evidence on any other theory?

"Mr. Clemons: That's our position.

"The Court: I take it then, Mr. Clemons, that really nothing remains to be tried on your theory. You, of course, do not accept the court's interpretation of the contract. I don't want to make any suggestion, but it would seem to the Court that all that is left to you is your right of appeal. Is that your thought? The Court would be obliged to deny any judgment on the theory which you advance and intend to prosecute your case, as I understand you.

"Mr. Clemons: That is as I so understood the Court this morning.

"The Court: Yes.

"Mr. Clemons: Yes.

"Mr. Ray: If the Court please, in view of what has now transpired, we move the Court for a dismissal of this action.

"The Court: There were some matters that have got into the record since the last time that I conferred with you gentlemen. There were requests for admissions by the plaintiff which were responded to, and there were requests for admissions by the defendants,

and those admissions were in large denied. I don't know what posture that puts the case in at the moment.

"Mr. Ray: We answered all the interrogatories submitted to us pursuant to your Honor's order. Then we made request for admissions, some of them have been denied, but in view of what counsel now says those denials are of no consequence because he wouldn't put in proof upon the subject of those interrogatories anyway.

"The Court: That is your understanding, you would not have any proof to offer in respect to those interrogatories? Is that correct?

"Mr. Clemons: Our position is that in our case in chief we would offer no proof in connection with such matters. I am not saying that we would not offer rebuttal if the defense would interpose—submit proof. I am not foreclosing that, your Honor, in the event of trial, but on the case in chief, we would put in no information on those matters as to smelting costs.

"Mr. Ray: I would assume, your Honor, that if counsel elects to appeal from this case he would designate for inclusion in the record such matter as the record contains in which he thinks it would be beneficial to him, including our answers to his interrogatories.

"The Court: I would assume he would. What have you to say in response to counsel's motion to dismiss this case, if anything?

"Mr. Clemons: Your Honor, I have nothing to say with reference to his motion. As I understood, the Court this morning made some statement about nonsuit. I don't know if a motion to dismiss is in the nature of a nonsuit.

* * * * *

"The Court: Well, this order will be entered at this time. I think counsel has been afraid all the time that he might be in some way foreclosed in this case, that is from having a review.

"Mr. Clemons: I did want to save for ourselves the right of review on this particular point.

"The Court: This will certainly present it for you."

Following the foregoing the Court entered its judgment which is set forth at Page 189 of the Record. From the foregoing it seems apparent that only two issues emerge for decision:

1. Did the trial court correctly construe and interpret the contract and if so

2. Was it appropriate to enter a judgment of dismissal following pre-trial conference?

ARGUMENT

I. The Court Correctly Construed the Contract

Three and one-half years after this case had begun its costly and tedious course through the lower court, and on pre-trial hearing as noted in the foregoing Statement of the Case, counsel for appellant made certain statements in response to questions by the court which referred to requested admissions, which statements serve to high-light the issue here.

Asked whether he admitted that royalty payable on net smelter returns received by appellee from independent smelters had been paid to appellant, counsel for appellant said:

"We have admitted that. That has never been in issue here. We admitted what they paid to us." (R. 201)

"The second admission they requested, those were all items under No. 1, was that the net smelter returns computed by defendant Bradley Mining Company on all concentrates processed at the Yellow Pine Smelter were computed by defendant Bradley Mining Company on the same basis as net smelter returns were computed

by independent smelters to which like concentrates were shipped. That we deny." (R. 201)

Appellee had alleged in its answer that :

"Defendant alleges the amount of royalties payable to the plaintiff by the defendant as required by said agreement of December 31, 1941, has been computed as to concentrates treated in the Yellow Pine Smelter upon the basis of net smelter returns as defined in said agreement, which basis is the equivalent of the value of such concentrates on the mining property; that as to concentrates shipped to outside smelters the amount of royalties payable to the plaintiff by the defendant as required by said agreement has been computed upon the basis of the amount paid therefor by the purchaser less transportation charges. This defendant alleges that as a result of the construction and operation of the Yellow Pine Smelter large tonnages of low grade ores have become marketable, which ores, but for the construction of said smelter, would have had little or no value and other ores have become more valuable, and as a consequence plaintiff has been paid and will continue in the future to receive royalty payments far in excess of the royalties that would have been payable had the Yellow Pine Smelter not been constructed." (R. 46)

The following colloquy then occurred at the pre-trial conference :

"The Court: Just a moment. As regards this matter of computation on the royalties on the basis of the market value of the concentrates at the mine. I take it that the plaintiff has not admitted that you have paid the royalty on that basis.

"Mr. Ray: That is what we want to find out, if they do or do not.

"The Court: What about that Mr. Clemons?

“Mr. Clemons: I will have to admit that they paid us royalty. The basis upon which they have paid them, I am not prepared to admit that is the same basis that anyone else would pay. I don’t know, so I cannot admit that. We know they have paid us money, yes, but as to how they have computed it, I don’t think that we should be required to admit that is the proper and correct way of computing it, or that it is proper at all.

“Mr. Ray: How do you propose to prove your case then if you can’t either admit or deny that our computations are right? The burden is upon you. How do you propose to present your case? We would like to know so we can meet it, if you have one.

“The Court: Do you consider you have no burden of going forward at all with that proof? You are asking a money judgment here.

“Mr. Clemons: That is right, your Honor.” (R. 208-209)

After some further discussion counsel for appellant requested a recess until after noon, and when court reconvened, counsel stated that he had conferred with his associate counsel and was prepared to say that the theory stated by him (that appellant was entitled to recover upon the “net revenue” basis) notwithstanding the court’s ruling to the contrary would be the theory upon which appellant would present the case and that they would not offer any evidence on any other theory. The court then said:

“The Court: I take it then, Mr. Clemons, that really nothing remains to be tried on your theory. You, of course, do not accept the Court’s interpretation of the contract. I don’t want to make any suggestion, but it would seem to the Court that all that is left to you is your right of appeal. Is that your thought? The Court would be obliged to deny any judgment on the theory

which you advance and intend to prosecute your case, as I understand you.

“Mr. Clemons: That is as I so understood the Court this morning.” (R. 213, 214)

Appellant conceded that the contract meant that royalties on ores shipped to independently owned smelters should be settled for on the basis of the net proceeds received for such ores from such independent smelters.

Such proceeds of course represented the gross proceeds on ores shipped to such independent smelters and remaining after deducting their normal smelting charges.

Such charges consisted of base charge, percentage of metal value for which payment is made, penalties for impurities (and other items), are reflected in the exhibits attached to appellant's complaint and there is no dispute between the parties as to the meaning of normal smelting charges.

Appellant, however, asserts that the contract has a different meaning when attention is directed to ores processed in a smelter owned by the appellee and that with respect to such ores royalties are payable upon the basis of *gross* smelter returns—that is the amounts which would be paid by a smelter based on metal content of ores received by it without any deduction for normal smelting charges.

Appellant does not use the phrase “gross smelter returns” but on the contrary asserts that an equivalent basis must be applied in computing royalties payable—namely, that royalties must be computed upon the “net revenue basis”, that is to say, without any allowance to the defendant for its normal smelting charges.

From the foregoing, it clearly appears that appellant had no complaint when royalties paid on ores shipped to independently owned smelters were paid on the basis of the

net proceeds received from such smelters notwithstanding that in arriving at the net proceeds so payable, such independently owned smelters deducted their normal smelting charges.

And it clearly appears that appellant had no thought of attempting to show that the payments made by appellee on account of royalties on ores processed at the Yellow Pine Smelter were one cent less than there would have been payable had such ores been shipped to independently owned smelters.

Yet appellant asserts that the court did not correctly construe the contract.

Appellant does not contend there was any obligation on the part of appellee to build a smelter or to operate a smelter; does not contend that it would have been entitled to receive one cent more than it in fact has received had the appellee not built and operated a smelter. But appellant, notwithstanding it in effect confesses that it has in no way been injured through the processing of ores in the Yellow Pine Smelter, asserts that the contract must be construed as entitling appellant to vastly greater royalties than it would have otherwise been entitled to receive because appellant was so ill-advised as to spend millions of dollars in the construction of a smelter and much more in its operation.

An examination of the wording of the contract will disclose that there is no basis for a construction leading to such an extraordinary result, nothing to indicate any such intent on the part of the parties when the contract was entered into.

To construe the contract as appellant would have the court do would necessarily require that the primary purpose of the parties be ignored; it would require the reading into the contract of language not therein contained, the injection into the contract of duplicate provisions covering

the same matter, and the refusal to give effect to certain of its terms.

The issue in question which the court below was called on to decide and which is now presented to this Honorable Court, may in the light of the foregoing be stated as follows:

Does the ownership or control of a smelter determine whether royalties are payable upon *net* smelter returns or *gross* smelter returns under the contract which provides for the payment of royalties upon *net* smelter returns, *net* revenue, or *net* mint returns?

Implicit in appellant's contention is the assumption that the definition of net smelter returns applies only to what is received by appellee from an independently owned smelter; this requires the reading into the definition of net smelter returns the words "independently owned" so that the definition will read:

"By *net smelter returns*, as used herein is meant the amount received from the *independently owned* smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that the smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said Smelter shall also be deducted."

This being done we have two bases for computing royalties on concentrates sold to a smelter—"net smelter returns" and "net revenue"—for net smelter returns received by appellee from an independently owned smelter are the purchase price of concentrates sold and are received on a sale of such concentrates (Mr. Oberbillig—president of appellant—at page 13 of his counter-affidavit, says he knows of no other meaning of the words "net smelter returns", R. 132).

Such bases are dollar wise identical but are labeled "net smelter returns" and "net revenue".

Why did the parties separately define net smelter returns and net revenue if they were one and the same? Of course, no such meaningless duplication was intended as a comparison of the wording of the three definitions "net smelter returns", "net revenue" and "net mint returns" discloses:

"Net smelter returns" is defined as the amount *received* for ores, etc., *shipped* to a smelter.

"Net revenue" is defined as the amount *paid* by any purchaser on a *sale*.

"Net mint returns" are defined as the amount *paid* by the United States Mint.

Note the contrast between the words "*received*" and "*shipped*" in the definition of net smelter returns and the words "*paid*", "*any purchaser*" and "*sale*" in the definition of net revenue.

Note that in defining net smelter returns it was expressly provided that "*the smelter will deduct its normal smelting charges.*"

If the parties intended to refer only to independently owned smelters why did they insert this provision in the agreement? Such independently owned smelters are purchasers if ores or concentrates are shipped to them and they remit to appellee the amount of the net smelter returns, and what they will pay is determined by them.

Of course they would deduct their normal smelting charges,—both parties to the agreement were perfectly aware of that—and would deduct such charges whether as between the parties to this agreement it was or was not so agreed.

If it was necessary to provide that a purchaser, if a smelter, should *deduct its normal smelting charges* in determining what it would pay, why was not a like proviso inserted as to "any purchaser"—which term certainly did not exclude

a smelter purchaser? Only if the parties had in mind a smelter owned or controlled by appellee could there have been reason for including such proviso, and with that in mind such proviso was imperative for otherwise there would have been no basis for computing net smelter returns by such a smelter.

A case which we believe to be very much in point is that of *Armstrong v. Skelly Oil Co.*, (CCA 5th 1932) 55 F.2d 1066, wherein the Circuit Court upheld the right of an oil and gas Lessee which had erected a casing head gasoline extraction plant on the leased premises to deduct normal charges including depreciation and fair return on investment in computing the Lessor's royalty share, the Court saying in this connection at page 1068:

"Appellees were under no obligation to erect a plant to treat this gas. When they did so they were entitled to deal with the lessor the same as a stranger would have done. Had the gas been sold to an extracting plant, the lessee, under the universal custom of the trade, would have received returns identically the same as those made by appellees.

"The method used to ascertain the value of the gas taken is fair. It would not be just to settle with the seller of the gas at the market price for the full amount delivered. That would leave nothing to cover shrinkage in extraction and the cost of manufacture, including overhead charges, and a fair return on the investment."

The inherent weakness of appellant's claim that the appellee does not have the right to deduct normal smelting charges as to concentrates and minerals processed in its own smelter is illustrated by paraphrasing the language used by the California Supreme Court in the case of *Meyers*

v. Texas Co., 6 C.2d 610 (1936) 59 P.2d 132 at page 136, as follows :

For the purpose of arriving at the intent of the parties, we can assume a situation where, if the items mentioned are not to be deducted as a part of the cost of processing the ores and minerals, the profits would not justify the Lessee in processing marginal, low grade, and unmarketable concentrates, as a result of which, under its contract, the plaintiff would receive no return, whereas if they are to be deducted, a fair return may inure to both.

It cannot be seriously doubted that the "principal purpose of the agreement" was to provide for the payment of a royalty of 5% of the *net* realizable value of the mine product, irrespective of how it was realized, and that it was not intended that either party should profit at the expense of the other, because, fortuitously the mine product was disposed of in any particular manner.

For the information of the Court we are citing the Idaho cases that state the Idaho rule with respect to the construction of contracts.

In the case of *Durant v. Snyder*, 65 Idaho 678, 151 P.2d 776 (1934), the Idaho Supreme Court states the rule as follows :

"The intent of the parties to a written agreement, is, if possible, to be ascertained by the language as contained therein. (12 Am. Jur. pg. 745, sec. 227.) If the Court is unable to determine the meaning of the contract, however, from its terms, then evidence should be received to determine the meaning and intention.
* * * And in construing a written instrument, where the language used is clear, certain and unambiguous the Court will give effect to the language employed according to its ordinary meaning. * * * The contract

is to be given effect according to its terms and the Court can neither substitute nor write a new contract."

And in the case of *Molyneux v. Twin Falls Canal Co.*, 54 Idaho 619, 35 P.(2) 651, (1944) the Court said:

"In construing a written instrument to determine what is intended by it the court must examine the whole instrument and if the meaning is clear and unambiguous and involves no absurdity or contradiction, the contract must be enforced according to the plain import of the language used."

"The determination of the meaning and legal effect of such a contract is for the court alone (*Mark P. Miller Co. v. Butterfield-Elder Co.*, supra; *Messinger v. Cox*, supra; *First Nat. Bank v. Cruickshank*, 38 Ida. 789, 225 Pac. 142; but if the court is unable to determine the meaning of the contract from its terms, it should then hear testimony of witnesses to determine the meaning and intention of the parties as expressed by the contract."

In the case of *Twin Falls Orchard and Fruit Co. v. Salsbury*, 20 Idaho 110, 117 P. 118 (1911), the Idaho Court said:

"This court just held in *Schurger v. Mooreman*, ante, p. 97, 117 Pac. 122, that in the construction of a contract the court should endeavor to arrive at the real intention of the parties, and if there is room for doubt as to its true meaning, the facts and circumstances out of which such contract arose should be considered and the contract construed in the light of such facts and circumstances, so that the intention of the parties to the contract may be ascertained, if possible, and given effect."

Because of the completely opposite views taken by the plaintiff and defendant as to the intent and meaning of the contract, and not because appellee considered it as a neces-

sary aid to enable the Court to construe the contract, appellee pleaded affirmative matter in its answer (R. 41, 43-50) and submitted with its motion for summary judgment the affidavit of John D. Bradley (R. 52-65) for the purpose of showing the facts and circumstances out of which the contract arose, for the consideration of the Court should the Court deem such extrinsic matter to be necessary.

To put the proposition in the language of the Idaho Supreme Court:

"Testimony thus introduced merely defines or translates the language of the instrument. It does not vary or add to the terms of the writing and does not fall within the parol evidence rule. The testimony is admitted for the purpose of ascertaining not only the meaning of the words used, but the intention of the parties as expressed in the writing. Here we are confronted with a dispute between the parties as to the meaning of certain language used in the contract. Conceding, but not admitting, that the words used are ambiguous and uncertain, and that different minds might well reach different conclusions as to their meaning, in such a situation evidence may be received to ascertain the real intention of the parties. (Jones on Evidence, Vol. 2, 4th ed., sec. 455.)"

Stone v. Bradshaw, 64 Idaho 152 at page 159, 128 P.2d 844 (1942).

The objects and purposes of a contract are a proper subject of inquiry by the Court. *Clarke v. Blackfoot Water Works, Ltd.*, 39 Idaho 304, 228 Pac. 326.

It is respectfully submitted that a construction of the contract which gives effect to such obvious intent of the parties, which takes account of all of the provisions of the contract, which does not require the reading into the contract of extraneous matter, nor result in meaningless dupli-

cation and which operates to give to the appellant all that it claims to have been entitled to receive had the ores been otherwise disposed of than by processing at the Yellow Pine Smelter, is the proper construction to be given the contract.

II. Judgment of Dismissal After Pre-Trial Conference Was Properly Rendered.

The trial court held the pre-trial conference in accordance with Rule 16 of the Federal Rules of Civil Procedure. Among the purposes of pre-trial conference as specified by the rules are:

- (1) The simplification of the issues.
- (3) The possibility of obtaining admission to fact or of documents which will avoid unnecessary proof.
- (6) Such other matters as may aid in the disposition of the action.

In *McCarthy v. Lerner Stores Corporation*, 9 F.R.D. 31, (USDC D. of C. 1949) Judge Holtzoff states:

“Rule 16 of the Federal Rules of Civil Procedure, 28 U.S.C.A., which relates to pretrial, provides that the Court shall make an order which recites the action taken at the pretrial hearing. This order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injuries.

“(1) One of the chief purposes of pretrial procedure, and the principal usefulness of a pretrial order, is to formulate the issues to be litigated at the trial. The parties are bound by the pretrial order. They may not later inject an issue not raised at the pretrial conference. Otherwise the primary objective of pretrial procedure would be defeated.

“It is assumed by the Court that at the pretrial counsel are as thoroughly familiar with the case—making as complete a disclosure as they would at the trial, and being as completely prepared—as they will be at the

trial. This is an unavoidable and inexorable duty that the existing Federal practice imposes on members of the bar. To say that parties are not bound by the pre-trial order is a misunderstanding of the purpose and the office of pretrial."

At the pre-trial conference the court announced that the issue of law raised by the pleadings and the motions was whether appellant was entitled to relief upon the "net revenue" provisions of the contract relied upon by appellant, with no allowance to appellee for smelter charges. The Court announced that he had theretofore construed the contract contrary to the contentions of the plaintiff and that his decision in that connection would be re-stated as a part of the pre-trial order. The trial court then gave plaintiff an opportunity to raise or suggest any other issues of law which might properly be reserved for trial. Plaintiff suggested no other issue of law but on the contrary unequivocally announced its purpose to adhere to the construction of the contract which had been theretofore rejected by the court. Thus there was no issue of law to be decided upon a trial.

The court then pointed out to plaintiff that it was seeking a money judgment and that the burden of proof was upon it. Counsel then stated that it would try its case just as if the court had sustained its construction of the contract. It would raise no issue of fact on any other theory, and would complete its case upon trial by proving the amounts received by appellee for smelter products sold and then deducting the cost of freight and sales commissions to find a basis for applying the 5% royalties. The amounts received by appellee for the sale of smelter products together with the freight charges and sales commissions were already a part of the record and before the court by admission of appellee.

It is obvious that if there had been a trial, plaintiff would have offered the contract in evidence, it would then have offered proof as to the amount received by defendant for the sale of products of the Yellow Pine Smelter, together with the freight costs and sales commissions, all of which was already in the record. Such evidence, under the court's construction of the contract, would have been inadmissible because of immateriality. An objection to the offer would have been sustained. Plaintiff would then have rested with nothing in evidence but the contract. In such a situation a motion to dismiss would have to be granted.

Upon the record it would have been idle and useless to set the matter down for trial. At the end of the pre-trial the only issue of law in the case had been settled and decided. No material issue of fact remained for decision. In such case an action should be dismissed upon pre-trial.

Decided cases upon the point support appellee's contention that since there was no genuine issue of law or fact remaining after pre-trial, it was proper for the court to enter judgment of dismissal.

Dismissal of the action was proper, when the court was informed by counsel for appellant that it would offer evidence only upon an issue upon which the court had ruled against appellant. In *King v. Edward Hines Lumber Co.*, 68 F. Supp. 1019, 1021 (D.C.D. Ore. 1946), Judge Fee said, in discussing the admissions by counsel at a pre-trial conference that limited the issues of the action to a single issue:

“If the court cannot rely upon the admissions of counsel made in pretrial conferences, then that procedure has no validity. The court must be able to trust counsel's knowledge of the law and of the fact. If counsel should be mistaken as to both and yet stipulate to a fact, or to a ground of liability, or that he has no claim under a specific theory of law, then no judgment

founded upon a pretrial order or conference would be valid.”

In the above case the court found that a single issue controlled the action, and when this issue was determined adversely to plaintiff, the court entered a final order of dismissal.

It is proper for the court to rule on questions of admissibility of evidence at a pre-trial conference.

United States v. Certain Tracts of Land in Los Angeles County, Cal., et al, 57 F. Supp. 739 (D.C.S.D. Calif. 1944);

Rivera v. American Export Lines, Inc., et al, 13 F.R.D. 27 (USDC SDNY 1952);

United States v. Certain Parcels of Land in Los Angeles County, et al, 63 F. Supp. 175 (D.C. S.D. Calif. 1945).

Where a pre-trial order has eliminated an issue from an action, no finding on that issue is necessary. In *Fanchon & Marco v. Hagenbeck-Wallace Shows Co.*, 125 F 2d 101, 104 (CCA 9th 1952) the court held:

“By a pre-trial order dated November 25, 1940, this issue was excluded from the case, thus obviating the need of a finding thereon. There is, therefore, no merit in appellant’s contention that, for lack of such a finding, the judgment should be reversed.”

A final judgment of dismissal was a proper order at the end of this pre-trial conference. In *Silvera v. Broadway Department Store*, 35 F. Supp. 625, 627 (D.C. S.D. Calif. 1940) the court held:

“The court has power under Pre-trial Rule No. 16 to dismiss when the facts submitted and proof show no cause of action.”

for trial. In effect, and in fact, appellant invited a dismissal.

Appellant also ignores completely the scope and function of a pre-trial. Thus the general authorities and decisions cited by appellant are not in point.

CONCLUSION

To construe the contract in suit in harmony with the claim of appellant and permit recovery of royalties upon amounts received for smelter products sold with no allowance to appellee for the normal smelting charges and costs of the Yellow Pine smelter, would require deletion from the contract of the net smelter and normal smelting cost provisions, and would at the same time unjustly enrich appellants.

To have held the case over after pre-trial conference for a formal trial would under the circumstances set forth above, have been useless and idle and contrary to the spirit and purpose of the pre-trial procedure.

We respectfully submit therefore that the judgment of the trial court should be sustained.

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IN THE
United States
Court of Appeals
For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
Appellant,
vs.
BRADLEY MINING COMPANY,
Appellee.

REPLY BRIEF OF APPELLANT

*Appeal from the United States District Court
For the District of Idaho, Southern Division*

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ARGUMENT

We desire to reply to Bradley's brief. If Bradley's position is sustained, United has no remedy. What does this case involve? We have a contract by which United transferred properties of great value to Bradley. What was United to receive under the contract? Payments under the contract were to be determined in one of three methods, namely: "net mint returns," "net smelter returns," or "net revenue" as defined in the contract.

Obviously "net mint returns" do not apply to this situation.

The lower court stated in its opinion with reference to "net smelter returns":

"I have been able to find no provision, certainly no adequate provision such as one would expect to find in an arrangement involving operations of such magnitude and importance as we have here, prescribing the method of computing the royalty in event the Company should install and operate a smelter of its own upon the property. * * * But we are still faced with a situation where the contract does not reflect any precise basis for computing the royalty under the circumstances now existing."

This in substance eliminates both "net mint returns" and "net smelter returns" and leaves only one method under the contract to compute royalties. The lower court in discussing "net revenue" stated:

"In my opinion certain language in the definition of the term 'net smelter returns' precludes the existence of such an understanding (that royalties would be computed under the net revenue clause) even though the language is vague when read in the light of the practice."

The lower court did not point out what language in the definition of the term "net smelter returns" precluded the application of "net revenues" as the

basis for computing royalties and we see no language which precludes such interpretation. In fact, the net revenue clause precisely by definition covers the present situation.

It is our position that Bradley erected the smelter on the property which United deeded to it as its own unilateral act, under which United had no control and that United should not be charged with the costs of operation, salaries and other costs of such smelter before computing royalties. United does not believe that Bradley can deal with itself, it cannot buy its own product and stay within the terms of the contract.

The lower court in its memorandum decision of October 10, 1952, has indicated that a quantum meruit theory should be adopted for smelter costs. With this we do not agree. This would constitute the making of a new contract and inevitably lead to a multiplicity of suits.

In its complaint United simply asks this question:

(1) A determination of the contract and what it meant with respect to the payment of royalties, and

(2) An accounting to determine if Bradley had fully accounted to United for all moneys which may be due United. The decision of the lower court does not give a determination of either point.

There is another factor in this case which needs to be determined and that is the retention by Bradley in inventory of approximately two million pounds of oxide (R. 171) which remain unsold and in its possession at this time and in which United cer-

tainly has some interest. Upon what basis or formula did the court find the determination of United's royalties or interest in this "unsold product"? We do not believe that a reading of the contract allows Bradley to buy its own ore, concentrates or metals and to compute royalties on such basis. Royalties are to be computed on *amounts received* by and *amounts paid* to Bradley.

Counsel for Bradley makes a great-to-do about the equities of the situation. Let us look at the true equities. Property of tremendous value was transferred to Bradley in consideration of certain royalty payments. Nothing was said about the erection of a smelter by Bradley. Nothing was said about the erection of a concentrator mill or other reduction works. There is nothing in the record that United at any time consented either actively or constructively in the erection of the smelter. It was a matter beyond the province of United. United relies on its contract and the terms and conditions of that contract and to destroy this contract would have the effect of leaving valuable property in the hands of Bradley and with no accounting available to United.

This matter is before the court on a summary dismissal without United having its full day in court and it has been deprived of the exercise of due process of law in that there has been an abridgement of its contract and no accounting thereunder on any theory. We cannot believe that United should be required to come into court at the end of every accounting period and sue on a quantum meruit basis to

determine what it has coming by way of royalties.

It is United's contention that it should have an interpretation of the contract by this court as prayed in the complaint and after such interpretation the matter be referred to the lower court for an accounting in harmony with the court's opinion.

The order of the lower court in dismissing the action stated in part:

"Plaintiff is not entitled to have an accounting from the defendant, based upon the net revenue provision of said contract but only, if at all, upon the net smelter returns provision of said contract."

This leaves United in the position of not being entitled to an accounting apparently for any reason and United is in no position to protect itself against self-serving accounting statements which might be furnished by Bradley.

United believes that the "net revenue" clause is applicable wherein it is stated:

"By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho."

United should not be required in the face of the foregoing provision of the contract to rely upon quantum meruit or any other basis than that contained in the contract between the parties as a basis for determining its royalties.

We, therefore, respectfully request the court that the decision of the lower court be reversed and that this court construe the contract and that the lower court be ordered to make such accounting as is contemplated by the terms of the contract.

Respectfully submitted,

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No. 14,705

In the

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Appellant,

vs.

BRADLEY MINING COMPANY,
a corporation,

Appellee.

**Petition of Appellee for Rehearing
and**

**Motion for Modification Under
Fountain v. Filson, 336 U.S. 681.**

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No. 14,705

In the

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Appellant,

vs.

BRADLEY MINING COMPANY,
a corporation,

Appellee.

**Petition of Appellee for Rehearing
and
Motion for Modification Under
Fountain v. Filson, 336 U.S. 681.**

The appellee, BRADLEY MINING COMPANY, respectfully petitions for a rehearing and, alternatively, moves for a modification of this Court's decision of February 8, 1956.¹ The decision goes farther than appellant sought in its Specifications of Error and farther than we believe the Court could have meant to go or may properly go.

1. Time to file this petition was extended by an order of March 2, 1956.

All emphasis in quotations has been added.

NATURE OF THIS COURT'S DECISION

Before enumerating the grounds for rehearing and modification, a brief resume of the nature of this Court's decision is desirable.

This case turns on the construction of a written contract. What the District Court did was to enter a *summary judgment* for defendant—the appellee—by construing the contract on its face alone and without reference to or the aid of any *extrinsic evidence*. On *that* construction plaintiff—the appellant—conceded that it had no money claim (R. 213, 215, 218), and consequently the complaint was dismissed (R. 189).²

This Court's decision holds that the contract does not on its face bear the construction which Judge Healy, sitting as the District Judge, gave it. *If* by reference to its text alone the contract cannot be given that construction, then reversal must indeed follow. But this Court's decision goes beyond a reversal. Reaching a different construction than did the District Court, *it then fastens that construction on the contract* and remands the case, *so fettered*, for proceedings merely to determine the amount of money due.

That is to say, this Court's decision reverses a summary judgment for defendant but then turns around and directs a summary judgment for plaintiff. Thereby it denies appellee the right to a trial on the major issue of the case, namely, the construction of the contract.

And this summary termination of the important issue of the case has taken place although appellant did not seek a summary

2. In the District Court appellee first moved for summary judgment (R. 51) and it was denied (R. 136). After other proceedings the case came on for a pre-trial conference (R. 188). One of the purposes of a pre-trial conference is to render a partial summary judgment, if warranted, *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 670 (9 Cir.). At that conference the District Court announced the construction of the contract reached by it as an "issue of law" (R. 205, 215, 221), i.e., on the face of the written contract alone. The court then held there "is no genuine issue as to any material fact" (R. 190). Its judgment was thus a summary judgment (R.C.P. Rule 56).

construction of the contract in either the District Court or this Court. Appellant did not move for a summary judgment in the District Court. And its grievance on appeal was that the District Court should have let the case be tried on the "main issue of interpretation of the contract".³ Appellant summed up the burden of its grievance in these words:

"Assignments of Error numbered I, II, III, IV, V and VII may be condensed in the following restatement * * *. It was error to enter a judgment of dismissal without interpreting the contract *either as contended by United or as contended by Bradley after having entered findings of fact*", i.e., for or against it but after a trial (Brief of Appellant, p. 12.)⁴

GROUND FOR REHEARING OR MODIFICATION

The grounds we submit for a rehearing may be summed up in one statement—that the action of this Court in going beyond a mere reversal and remand is erroneous. The reason for this statement may be summarized thus:

1. If the contract does not on its face clearly bear the construction given it by the District Court, then under the applicable State law (controlling under *Erie R. Co. v. Tompkins*, 304 U.S. 64), it is sufficiently ambiguous so as to permit the introduction of extrinsic evidence as an instrument of construction.
2. Under the law of California and Idaho, upon the slightest ambiguity in a contract, extrinsic evidence is admissible in aid of its construction.
3. When extrinsic evidence is admissible, the construction is a question of fact, the case must be tried, a summary judgment construing the document is not permissible,

3. Appellant's Statement of Points, No. III, R. 222.

4. Its complaint was that the court erred "by dismissing the action without a trial when genuine issues of fact were pending" (Br. p. 18). See also Brief of Appellant, pp. 13, 20.

and the fact that one party moved for a summary judgment does not justify entry of summary judgment against it.

4. Particularly, in such a case, an appellate court may not construe the contract. In going beyond a mere reversal and remand for an unfettered trial, and in summarily construing the contract, the Court's decision conflicts with *Fountain v. Filson*, 336 U.S. 681.
5. Consequently, if the judgment of the District Court is to be reversed, the case should be remanded for a trial to determine the actual intent of the parties in making the contract and to this end to receive evidence of the customs, usages and practices of the mining and metallurgical industries, the background and circumstances in which the contract was made, the contemporaneous conduct of the parties under it, and other extrinsic circumstances, some of which we shall describe.

MOTION FOR MODIFICATION OF ORDER

In *Fountain v. Filson*, supra, discussed at pages 16-20 below, the Supreme Court, in reversing a Court of Appeals in a situation identical to the one here presented, noted that appellee-defendant made a "timely motion for a modification of this order [of the Court of Appeals] in order to permit a trial as to the existence of the" obligation (336 U.S. at 682). We therefore attach to this petition a formal motion to that effect.

DISCUSSION

At the threshold it will serve clarity to state succinctly the ultimate issue in this case.

Prior to 1941 appellant owned certain mining claims in Idaho, which appellee had been mining ever since 1927 under a succession of royalty agreements. In 1941 appellee bought these

properties from appellant and by written agreement promised to pay, as the consideration, five per cent (5%) for 999 years

"on all net smelter returns, net revenue, and net mint returns, as defined herein, upon and for all minerals, ores, metals or values, of any and every kind and character, mined, extracted or taken from the above described mining claims, or any part thereof, or from any lands, grounds or claims, lodes or deposits, within the exterior boundaries of said groups of claims * * *" (R. 15)

Prior to 1949 appellee owned no smelter but shipped and sold the concentrates from the properties to smelters owned by others and paid appellant 5% of the proceeds. There is no question as to the correctness of these payments.

In 1949 appellee built its own smelter on the premises, called the "Yellow Pine smelter". Smelting, as we note at page 26 *infra*, is a wholly different business from mining and the miner's ordinary treatment processes.

The Precise Issue of Construction of the Contract

This Court's opinion states that

"it is not conceivable that the parties intended that United would be deprived of all royalties by the simple device of Bradley building its own smelter near its mines." (Op. p. 3)

We agree. But this misconceives the issue. No one has *ever* contended that by building its own smelter appellee would escape paying royalties. Indeed, appellee has already paid royalties in six figures on material going through that smelter. *The question is entirely different*. It is not whether appellant shall cease to get anything because appellee erected its own smelter but whether appellant is to get considerably *more* than it otherwise would.

Suppose the Yellow Pine smelter had been erected and was owned and operated by John Doe, a third party. Appellant's 5% would then be calculated **after deduction of the smelter charges**.

Or suppose that appellee were to sell the Yellow Pine smelter to John Doe who should thereafter operate it. Appellant's 5% would then also be calculated **after deduction of the smelter charges**.

Or suppose that tomorrow fire and flood were to destroy the Yellow Pine smelter so that concentrates again had to be sent to another's smelter. Appellant's 5%, as before the erection of the Yellow Pine smelter, would be calculated **after deduction of smelter charges** (and also after deduction of transportation charges as well).

But just because appellee owns the smelter (which it built at a cost to itself of \$2,000,000) appellant claims that its 5% should be calculated *without first deducting smelter charges*. The alternatives presented are not whether, on appellee's contention, appellant should now get nothing on local concentrates passing through the Yellow Pine smelter or, on appellant's contention, that it get the same as if the smelter were "independently owned." The alternatives are whether, on appellee's contention, appellant shall get the same and, upon appellant's contention, that it get considerably more than if the smelter were independently owned.⁵

Under appellee's construction appellant has been paid in full (R. 213). This Court's decision summarily adopts appellant's construction, which almost doubles the royalties. From the opening of the smelter in 1949 to the dismissal below, this construction imposes an added burden of in excess of \$100,000. Even assuming only 25 years of operations in the remaining 984 years of the contract term, the issue involves \$1,000,000.

5. This actually overstates the issue in appellant's favor. Independent smelters will pay little or nothing for silver or gold content in antimony concentrates and are not efficient enough to beneficiate some of the low content ore from the Bradley properties (Cf. allegations of answer, R. 46, and Affidavit, R. 59-61). Thus appellant will in any event have a greater return because appellee operates its own smelter. The question is whether, in addition, the share of smelting costs which otherwise would be borne by appellant are now to be saddled on appellee.

The Issue Now Presented to This Court

But the issue we ask this Court to consider on this petition and motion is not the ultimate answer to the foregoing question of construction but the principles by which it must be answered, the proper tribunal to answer it, and the proper procedure by which it is to be answered.

In *Fountain v. Filson*, 336 U.S. 681, petitioner submitted in its petition for certiorari that the Supreme Court should

“unmistakably inform bench and bar whether a litigant may resort to Rule 56 only if willing to gamble against losing all chance of trial should the appropriate Court of Appeals decide that his legal theory is not controlling”.

Certiorari was granted, and the Supreme Court answered that such a litigant was still guaranteed his right to a trial. Here the question is even starker:

When, at the pre-trial conference, Judge Healy announced that he was prepared to decide the construction of the contract as a question of law and to dismiss if plaintiff had no evidence of damages under that construction, was defendant obliged to reject the court's offer to decide in its favor and to insist on a trial in order to avoid losing all chance of trial should this Court of Appeals thereafter hold that Judge Healy erred?

Order of Discussion

In part IV of the discussion to follow we shall show that, if the District Court erred in construing the contract on its face in appellee's favor, then extrinsic evidence is necessary. We there note that this Court's opinion itself relies on extrinsic circumstances and we array the available extrinsic evidence, offer to prove it at a trial if given a chance, and show its bearing on the case. But first, in parts I, II and III, we discuss the consequences.

I.

Upon the Slightest Ambiguity in a Contract, Extrinsic Evidence Is Admissible in Aid of Construction.

Under *Erie R. Co. v. Tompkins*, 304 U.S. 64, the interpretation of the contract" must be decided according to state law. *Transcontinental Air v. Koppal*, 345 U.S. 653, 656."

This contract was entered into between an Idaho and a California corporation (R. 3). Depending on whether the latest signature was in California or Idaho, it is a California or Idaho contract. But it is immaterial which, for the law of the two states on construction of contracts is the same, and, as the Court knows, Idaho decisions pattern themselves on California law. Since the California cases on this subject are among the most articulate in the nation, the matter may be lucidly stated by quoting from them.⁷

In *Body-Steffner Co. v. Flotill Products*, 63 C.A. 2d 555, 147 P.2d 84, which amasses the authorities on the subject and in turn is approved in *Union Oil Co. v. Union Sugar Co.*, 31 Cal. 2d 300, 188 P.2d 470, the court succinctly stated two principles:

First (p. 558):

"It is a rule of practically universal acceptance in common law jurisdictions that however clear and unambiguous the

6. This Court had previously so held in *William S. Gray & Co. v. Western Borax Co.*, 99 F.2d 239, 242 (9 Cir., per Denman, C. J.). Accord: *Edward B. Marks Music Corporation v. Foullon*, 171 F.2d 905, 908 (2 Cir.).

7. For pertinent Idaho decisions see *Haener v. Albro*, 73 Ida. 250, 249 P.2d 919, 925 (1952); *Williams v. Idaho Potato Starch Co.*, 73 Ida. 13, 245 P.2d 1045 (1952); *Stone v. Bradshaw*, 64 Ida. 152, 128 P.2d 844 (1944); *Twin Falls Orchard & Fruit Co. v. Salsbury*, 20 Ida. 110, 117 Pac. 118, 122 (1911); *Molyneux v. Twin Falls Canal Co.*, 54 Ida. 619, 35 P.2d 651, 654; *Wood River Power Co. v. Arkoosh*, 37 Ida. 348, 215 Pac. 975, 976, 977; *Caldwell State Bank v. First Nat. Bank*, 49 Ida. 110, 286 Pac. 360; *Johansen v. Looney*, 30 Ida. 123, 163 Pac. 303 (1913).

In *Williams v. Idaho Potato Starch Co.*, supra, a contract called for "a ten inch pump". As the court said, this language was "clear on its face" but extrinsic evidence, if admitted, would show it to be in fact ambiguous:—"Upon the admission of this testimony, an ambiguity arises." The court held the evidence admissible, and held further that "evidence of prior and contemporaneous negotiations" was admissible to remove the ambiguity.

words of a particular contract may appear on its face it is always open to the parties to the contract to prove that by the general and accepted usage of the trade or business in which both parties are engaged and to which the contract applies the words have acquired a meaning different from their ordinary and popular sense.”⁸

Second, as respects “introduction of evidence, apart from evidence of trade usage” (p. 561-562):

“Where no extrinsic evidence is offered courts are too frequently compelled to construe ambiguities and to reconcile inconsistencies by a consideration of the contracts on their face; but where extrinsic evidence is offered to explain inconsistent provisions in a contract *courts should not strain to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.* ‘The true interpretation of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered an exception, or perhaps a corollary, to the general rule above stated, that when *any* doubt arises upon the true sense and meaning of the words themselves, or *any* difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself.’ ”

8. The court here cited Civil Code, Sec. 1644; Code Civ. Proc., Sec. 1861; Rest., Contracts, Sec. 246(a); 2 Williston on Sales, 2d ed., Sec. 618, p. 1556; 3 Williston on Contracts, rev. ed., Sec. 648, pp. 1871-2, Sec. 650, pp. 1874-9; 9 Wigmore on Evidence, 3d ed., Sec. 2463, p. 204; 25 C.J.S., Customs and Usages, Sec. 24, pp. 111-2, 17 C.J., Id., Sec. 61, pp. 498-9; 12 Am. Jur. Contracts, Sec. 237, pp. 762-3; note 89 A.L.R. p. 1228, et seq.

The Restatement of Contracts, Section 246(a), comment, states “The rule * * * is not confined to unfamiliar words or to words often used ambiguously. Familiar words may have different meanings in different places. A usage may show that the meaning of a written contract is different from an apparently clear meaning which the writing would otherwise bear.”

This Court has ruled the same way, even in the days before *Erie v. Tompkins* established that state law must be followed on non-federal questions. Thus, in *Consolidated Coppermines Corp. v. Nevada C. Copper Co.*, 64 F.2d 440 (adopting opinion in 44 F.2d 192, cer. den. 290 U.S. 664), a mining case like the present, on the basis of extrinsic evidence this Court affirmed a judgment construing contract words, "all of the ore", to mean only all underground ore and not shovel-mined ore; i.e., that it did not in fact mean "all the ore".

The United States Supreme Court has long held that resort may always be had to the circumstances in which the contract was made. *Lourey v. Hawaii*, 206 U.S. 206, 218, 219-222; *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 117-118; *Harten v. Loffler*, 212 U.S. 397, 404.

In fact, there is a great body of outstanding authority that extrinsic evidence is always admissible whether a contract is ambiguous on its face or not. *United States v. Bethlehem Steel Co.*, supra, is noted in *United States v. Lennox Metal Manufacturing Co.*, 225 F.2d 302 (2 Cir. 1955), as so holding, as are California decisions, Corbin on Contracts and 9 Wigmore on Evidence (3rd ed.), Sec. 2461, et seq.⁹ Thus Professor Corbin, in the latest and

9. The *Lennox* case states:

"The 'ambiguity-on-its-face' rule is a vestigial remain of a notion prevailing in 'primitive law' * * * [310]

"Even if a word in a written agreement is not ambiguous on its face, the better authorities hold that its context, its 'environment,' must be taken into account in deciding what the parties mutually had in mind when they used that verbal symbol.

"The problem of interpreting a contract is, of course, that of understanding the communication between the parties * * * [310] Judge Learned Hand has sagely warned that, in attempting a solution, it is 'one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary * * * [311] * * * '[T]he law requires the court to put itself as nearly as possible, in the position of the parties, with their knowledge and their ignorance, with their language and their usage. It is the meaning * * * of the parties, thus determined, that must

most thorough treatise on the subject, inquires whether "words [are] ever so 'plain and clear' as to exclude proof of surrounding circumstances and other extrinsic aids to interpretation" and doubts that they are (3 Corbin on Contracts, Sec. 542, p. 66). He states that cases so holding "should be subjected to constant attack and disapproval" because "it is easy to jump to a conclusion" (3 Corbin p. 71).

But without going so far, the courts almost universally agree, in the language of the *Body-Steffner* case, that if there is the least sign of ambiguity, then extrinsic evidence should be admitted and that the court should not strain to find absence of ambiguity. Thus in *United States v. Lennox Manufacturing Co.*, 225 F.2d 302 (2 Cir. 1955), it is said:

"* * * even those courts which still say ambiguity is a necessary condition of considering such extrinsic evidence are quick to find such ambiguity, on slight grounds, when the extrinsic evidence is convincing" (313).

In *Barham v. Barham*, 33 Cal. 2d 416, 202 P.2d 289, the Supreme Court of California sums up the rules of interpretation:

"Where *any doubt* exists as to the purport of the parties' dealings as expressed in the wording of their contract, the

be given legal effect.'"

In *Body-Steffner Co. v. Flotill Products*, 63 C.A. 2d 555, 562, 147 P.2d 84, the court similarly said:

"There is a considerable body of opinion among students of the subject whose conclusions are entitled to the greatest respect that parol evidence should always be admissible to show the sense in which the contracting parties used and understood the language of their written contracts."

See also *Wells v. Wells*, 74 C.A. 2d 449, 169 Pac. 2d 23 and *Union Oil Co. v. Union Sugar Co.*, 31 Cal. 2d 300, 306, 188 Pac. 2d 470, which cites, in support of the view that "extrinsic evidence is generally admissible to show the sense in which the parties used language embodied in the contract, whether or not the words appear ambiguous to the reader", *Universal Sales Corp. v. California etc. Mfg. Co.*, 20 Cal. 2d 751, 776, 128 P.2d 665; Rest. Contracts, § 242, comment a; Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 420; 9 Wigmore on Evidence (3d ed.) §§ 2458-2478; McBaine, *The Rule Against Disturbing Plain Meaning of Writings*, 31 Cal. L. Rev. 145.

court may look to the circumstances surrounding its execution—including the object, nature and subject matter of the agreement [citation]—as well as to subsequent acts or declarations of the parties 'shedding light upon the question of their mutual intention at the time of contracting' [citation]."¹⁰

II.

Where Extrinsic Evidence Is Admissible in Aid of Construction of a Contract, a Summary Judgment Is Not Permissible, and the Case Must Be Tried.

When extrinsic evidence is admissible, construction cannot be disposed of by summary judgment or by reference to affidavits. As said in 6 Moore's Federal Practice (2d ed.) Sec. 56.17(43):

"* * * where the contract is ambiguous and there is a genuine factual issue as to its meaning, summary judgment should be denied."

In *Boro Hall Corp. v. General Motors Corp.*, 164 F.2d 770, 771, 772 (2 Cir.) the court, noting that extrinsic evidence was admissible to interpret the contract before it, said:

"Plaintiff was therefore entitled to a trial at which it might offer evidence—including the testimony of its own officers and of defendant's officers or other employees—in aid of an interpretation * * *"

In *Dale v. Preg*, 204 F 2d 434, 435 (9 Cir.) this Court summed up the principle:

"By their amended answer appellants placed in issue the meaning of the agreement. The principal question on this

10. Compare the recent decision of the Court of Claims in *Blackburn v. United States*, 116 F. Supp. 584, 586 (1953) where a summary judgment was denied, the court saying:

"The language inserted in the contract is by no means so clear, *if language ever is so clear*, as to make inadmissible evidence as to what the parties to the contract intended it to mean. That intention, if it is mutual, is the essence of any contract, and the parties to it are privileged to use whatever form of shorthand, code, trade, ungrammatical, or other expression they may hit upon. They may make trouble for themselves and for a court by their unorthodox expression, but they do not forfeit their rights."

appeal is whether this was an issue of fact. If it was, it was error to grant summary judgment. * * * If * * * the contract can be said to be obscure or ambiguous in its terms, as appellants contend, then its meaning was a question of fact and extrinsic evidence should have been received in aid of its interpretation."

In *Detsch & Co. v. American Products Co.*, 152 F.2d 473 (9 Cir.), this Court (per Denman, C.J.) reversed a summary judgment because extrinsic evidence might be pertinent to the interpretation of the contract.

In *Farrand Optical Co. v. United States*, 107 F. Supp. 93, 96 (S.D. N.Y.):

"* * * where a contract is ambiguous and parol evidence is relevant and material to the issue of construction, a question of fact is presented. *Rolle Mfg. Co. v. Marco Chemicals Inc.*, D.C., 92 F. Supp. 218. A trial then should be had where the parties may offer relevant evidence on the issue."

And in the *Rolle* case, here cited, the court observed:

"The parties must therefore be afforded the opportunity to offer proof, not by affidavit but on a trial of the action.

"* * * Where the contract is ambiguous and parol evidence is relevant and material to the issue of construction, the construction of the contract is a question of fact." (92 F. Supp. at 219, 220).¹¹

THE FACT THAT APPELLEE MOVED FOR A SUMMARY JUDGMENT DOES NOT JUSTIFY THE ENTRY OF A SUMMARY JUDGMENT AGAINST IT.

We anticipate the argument that appellee opened itself to a summary judgment against it by moving for one against appellant. Such a contention would have no merit.

Appellant did not itself move for summary judgment. Appellee was never warned or apprised that if it should be held that the

11. Accord: *Golden v. Popper Shoe Corporation*, 94 F. Supp. 100 (D. Mass.).

contract did not unambiguously mean what appellee contends, then its adversary would ask for an opposite summary construction as a matter of law and without evidence. Had it been so apprised, appellee could and would have pointed to numerous relevant extrinsic circumstances of which it would offer evidence, and which would entitle it to a trial of the meaning of the contract as an issue of fact.

Courts have disagreed whether, if one party moves for a summary judgment, the District Court can grant a summary judgment in favor of the other who has not so moved. In *Fountain v. Filson*, 336 U.S. 681, the Supreme Court avoided that question.¹² But obviously the situation where appellant had not moved for a summary judgment is no better than if he had. In *Hycon Manufacturing Company v. H. Koch & Sons*, 219 F.2d 353 (9 Cir. 1955) this Court held, and in *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2 Cir.), cer. den. 328 U.S. 870, the court said:

"It does not follow that, merely because each side moves for a summary judgment, there is no issue of material fact. For, although a defendant may, on his own motion, assert that, *accepting his legal theory*, the facts are undisputed, he may be able and *should always be allowed to show* that, if plaintiff's legal theory be adopted, a genuine dispute as to a material fact exists."¹³

12. See discussion, 6 Moore's Fed. Prac. (2d ed.) § 56.12, p. 2088. In *Fountain v. Filson*, supra, the Supreme Court said:

"We need not pass on the propriety of an order for summary judgment by a district court in favor of one party after the opposite party has moved for a summary judgment * * *." (p. 682-683)

The Supreme Court's Advisory Committee on Rules for Civil Procedure seeks to settle this question by a proposed amendment to Rule 56. See "Report on Proposed Amendments to the Rules of Civil Procedure for the United States District Courts," (October 1955, Government Printing Office) p. 57, comment under proposed amendment to Rule 56.

13. Followed and quoted in *Krug v. Santa Fe Pac. R. Co.*, 158 F.2d 317 (D.C. Cir.) and in *Garrett Biblical Institute v. American University*, 163 F.2d 265, 266 (D.C. Cir.).

Or, as said by this Court in the *Hycon* case, there may be "postulates of fact involved in the diametrically opposite positions of the respective litigants" and "both contentions of fact could not be true."

The *Hycon* case cites *Begnaud v. White*, 170 F.2d 323 (6 Cir.), where the court said (p. 327):

"The fact that both parties make motions for summary judgment, and each contends in support of his respective motion that no genuine issue of fact exists, does not require the Court to rule that no fact issue exists. Each, in support of his own motion, may be willing to concede certain contentions of his opponent, which concession, however, is only for the purpose of the pending motion. If the motion is overruled, the concession is no longer effective. Appellants' concession that no genuine issue of fact existed was made in support of its own motion for summary judgment. We do not think that the concession continues over into the Court's separate consideration of appellee's motion for summary judgment in his behalf after appellants' motion was overruled."

And see, generally, 6 Moore's Fed. Practice, pp. 2089, 2092, et seq. As Moore states (p. 2089):

"Care should, of course, be taken by the district court to determine that the party against whom summary judgment is rendered has had a full and fair opportunity to meet the proposition that there is no genuine issue of material fact to be tried * * *."

Under R.C.P. Rule 12(b) a case cannot be disposed of as on motion for summary judgment unless the party against whom it is to be issued has been apprised by court or counsel that such relief is sought, so that he has full opportunity to make a showing to meet it, and thus protect his right to a trial.

This brings us to the question of this Court's power and function.

III.

It Follows That an Appellate Court May Not Construe the Contract and Certainly Cannot Do So Before a Trial. Here *Fountain v. Filson*, 336 U.S. 681.

From the principles limiting a trial court's power to construe a contract summarily, it follows, *a fortiori*, that an appellate court, in reversing a summary judgment rendered *for* appellee should not direct entry of a summary judgment *against* appellee. Here appellee, by its motion for a summary judgment, contended that the contract on its face unambiguously possessed the construction *it* advocated. It did not thereby concede or stipulate that should a court disagree with it, the contract could then be construed on its face alone. The District Court agreed with appellee's legal theory. But when this Court disagreed, it does not follow that appellee may be deprived of *the right to a trial and the opportunity of offering extrinsic evidence by documentary and oral testimony that would substantiate its construction or negative any other construction.*

Up to the moment this Court concluded that the judgment of the District Court should be reversed, its considerations were necessarily governed by the principle that all doubts had to be resolved against the party who had obtained the summary judgment, i.e., appellee. *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9 Cir.). But on the instant it concluded to reverse, and then proceeded *ex mero motu* to the question whether it should direct a summary construction *against* appellee, the field was reversed and it became necessary to resolve all doubts about the existence of an issue of fact in favor of appellee, and particularly so since the question thus became whether to order a summary judgment for one who had not moved for it, against one who had had no opportunity to oppose it, and on an incomplete record.

In *Fountain v. Filson*, 336 U.S. 681, on appeal from a summary judgment for a defendant, the Court of Appeals remanded the

case to the district court with directions to enter a money judgment for plaintiff, just as here this Court's decision leaves open a trial only to determine the amount of money due. In reaching its decision the Court of Appeals examined depositions *just as here this Court*, at its opinion shows, *examined and relied on affidavits* submitted by appellee. (See discussion p. 21, *infra*). The Supreme Court granted certiorari and in the same order, without further briefs or argument, reversed, saying:

"In *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and *Cone v. West Virginia Paper Co.*, 330 U.S. 212 (1947), we held that judgment notwithstanding the verdict could not be given in the Court of Appeals in favor of a party who had lost in the trial court and who had not there moved for such relief. *One of the reasons for so holding was that otherwise the party who had won in the trial court would be deprived of any opportunity to remedy the defect which the appellate court discovered in his case.* He would have had such an opportunity if a proper motion had been made by his opponent in the trial court. *The same principle interdicts, a fortiori, the appellate court order for summary judgment here.* Summary judgment may be given, under Rule 56, *only if there is no dispute as to any material fact.* * * * When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her."

Discussing this subject, Moore's Federal Practice states (p. 2091) that an appellate court, when reversing summary judgment for one party, *cannot direct a summary judgment for the other unless*

"it is clear that both sides [had] presented all the facts as though the hearing were a final one * * *. [A] party in whose favor summary judgment is rendered has the burden of establishing that there are no disputed material facts. It does not, therefore, follow that because summary judgment in favor of

the defendant on the issue of personal liability was erroneous that summary judgment for the plaintiff on that issue is proper. Unless, then, the case is clear, within the qualifications, and limitations just stated, the appellate court should not order summary judgment for the nonmoving party, but *should remand for further development of the case * * *.*"

This, says Moore (p. 2095), is true even where the appellant had himself made a motion for summary judgment and had thereby

"apprised his adversary, who also had moved for summary judgment, that he should be prepared to meet the appellant's position that on the undisputed facts appellant was entitled to judgment as a matter of law."

Even in that situation "the appellate court *should be quite certain* that no further exploration of the facts is in order."

These principles control the present case.

The construction of a contract is primarily the function of the trial court. The function of an appellate court is merely to review that construction, not to act *ab initio*. After the introduction of evidence at a future trial, the District Court will reach a construction. On appeal from *that* judgment, this Court's task could only be to determine whether the evidence adduced, *added* to the face of the contract, was sufficient support for the decision. This Court could not substitute its own view; it could only reverse "if clearly erroneous".

As said by this Court in *Hycon Manufacturing Company v. H. Koch & Sons*, 219 F.2d 353, 355 (9 Cir.),

"No authority is given except to District Courts to make new findings of fact. Presently our sole function * * * is to re-examine judicially, criticize and set aside if 'clearly erroneous.' The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law."

In *Arnstein v. Porter*, 154 F.2d 464, 474 (2 Cir.), it was said that one must not

"convert an appellate court into a trial court. The avowed purpose of those who sponsored the summary judgment practices was to eliminate needless trials * * * In the attempt to apply that reform—to avoid what is alleged to be a needless trial in a trial court—we should not conduct a trial in this court. Where the facts are thus in real dispute, it is our function, after a trial in the lower court, to review its legal conclusions and, with reference to its findings of fact, to determine not whether we would ourselves have made them, but merely whether they rest on sufficient evidence in the record * * * in reviewing a judgment * * * ours must be a limited function. This is not, and must not be, a trial court. Such a court has a duty more difficult and important than ours."

Construction of a contract with the aid of extrinsic evidence is a matter of inferences. Inferences are themselves facts, and a trial court's findings thereon, like any other findings, are controlling unless clearly erroneous. *Walling v. General Industries Co.*, 330 U.S. 545, 550; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29, 35. This Court has said that "any attempt on the part of the appellate court to draw an inference of fact [contrary to one not clearly erroneous] constitutes a 'usurpation of the province of the trial court' ". *United States v. Fotopulos*, 180 F.2d 631, 635 (9 Cir.). And see *Estate of Bristol*, 23 Cal. 2d 221, 143 P.2d 689, and *Estate of Rule*, 25 Cal. 2d 1, 152 P.2d 1003, where it is said that an appellate court may not supplant the trial court's interpretation of a contract where extrinsic evidence has been received which permits diverse inferences.

The Supreme Court's Advisory Committee praises this Court's decision in *Quon v. Niagara Fire Ins. Co. of New York*, 190 F.2d 257 (9 Cir.),¹⁴ where it was aptly said:

14. Report of October 1955, p. 53, comment under proposed amendment to Rule 52.

"The writing under these circumstances must be viewed in its setting together with all the other evidence in light of the credibility accorded the witness. Here the writing is one of the collateral facts. * * *"

"Under such circumstances, the use of the cliché that the appellate court is in as good a position as the trial judge to construe a writing is futile. The maxim is not true, as often happens with stereotyped sayings, in this situation. Here the construction entered into a finding of fact which cannot be set aside unless clearly erroneous. *In attributing imperative influence to a writing, courts would be reverting to the authoritarian doctrine of medieval scholasticism.* Wigmore's language made a destructive criticism of this view: '* * * a writing is, of itself alone considered, nothing,—simply nothing. It must take life and efficacy from other facts, to which it owes its birth; and these facts, as its creator, have as great a right to be known and considered as their creature has. * * * There is no magic in the writing itself. It hangs in mid-air, incapable of self-support, until some foundation of other facts has been built for it.' 9 Wigmore on Evidence, 3rd Ed., 5."¹⁵

The fact that a case is to be court tried instead of jury tried is irrelevant. The same principles apply.¹⁶

15. Numerous other decisions of this Court can be cited on the limited function of an appellate court. E.g., *W'ailua Agr. Co. v. Maneja*, 178 F.2d 603; *Helbush v. Finkle*, 170 F.2d 41; *Paramount Pest Control Service v. Brewer*, 170 F.2d 553; *Jacuzzi Bros. v. Berkeley Pump Co.*, 191 F.2d 632, 637.

16. As said by the Second Circuit in *Colby v. Klune*, 178 F.2d 872, 874: "Nor is the situation different because the trial will be before a trial judge without a jury. For how can the judge know, previous to trial, from reading paper testimony, what he will think of the testimony if and when, at a trial, he sees and hears the witnesses?"

IV.

Appellee is Entitled to a Trial in Order to Offer Extrinsic Evidence in Aid of the Construction of the Contract.

We come now to the question whether the contract calls for extrinsic evidence. In answering that question, we need not rely on the principle that one has a right to a trial where "there is *any* doubt as to whether there is a fact issue", *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9 Cir.), or "the slightest doubt", *Gottlieb v. Isenman*, 215 F.2d 184, 186 (1 Cir.), *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130 (2 Cir.)¹⁷.

Here the matter, we submit, is clear.

A. THIS COURT HAS ITSELF GONE OUTSIDE OF THE FACE OF THE CONTRACT INTO AFFIDAVITS FOR EXTRINSIC EVIDENCE TO REACH ITS CONSTRUCTION, THUS DECIDING AN ISSUE OF FACT WITHOUT TRIAL.

This Court has itself resorted to extrinsic circumstances to reach its interpretation. Its opinion states (pp. 1-2):

"Bradley's mines are situated near Stibnite, Idaho, some 80 miles from the nearest railway station at Cascade. * * * The ores are of a very low grade, consisting principally of antimony and gold. The wagon road from Stibnite to Cascade is over high mountainous territory at points exceeding seven thousand feet in elevation; it is not hard surfaced and due to weather conditions is for considerable periods during the winter months either closed to or unsuitable for use in the transportation of heavy material.

"* * * Bradley erected a concentration plant at Stibnite near the mines. That plant produced bulky concentrates to be carried over the eighty miles of unsurfaced mountain road to the railroad at Cascade."

17. Or "if the slightest issue of fact is presented", *Metropolitan Life Ins. Co. v. Everett*, 15 F.R.D. 498, 499; or "a reasonable indication that a material fact is in dispute", *Begnaud v. White*, 170 F.2d 323 (6 Cir.).

These facts are not to be found in the pleadings or the contract, but come from an affidavit of John D. Bradley (R. 52 at 59). Yet they are facts which enter into the Court's reasoning, for the opinion states (p. 3):

"It is obvious that with a vast acreage of deposits contemplating 999 years of mining it was most likely that Bradley would seek to avoid the cost of the long mountainous unsurfaced road haul of its concentrates, by having built or itself building a smelter near the mines."

From what is the fact thought to be "obvious"?—not from the writing itself, but from the fact of a "long mountainous unsurfaced road haul". But that is an **extrinsic circumstance taken from an affidavit**. Again, the Court's opinion asserts of another statement

"That this is the general method of computing the price paid by smelters also appears from the affidavit of Harold E. Lee, an expert witness."

The reference is to R. 110.

Since extrinsic circumstances are thus to be consulted, *appellee* is (1) *entitled to a trial where it can bring living witnesses*, rather than be relegated to affidavits,¹⁸ (2) it is entitled to a trial by a trial court rather than a trial by an appellate court, and (3) it is entitled to produce all available extrinsic circumstances and not have the case decided on what happened to be in a record made for other purposes.

As we have seen, the Court cannot decide this case against appellee on the basis of these affidavits, just because they were filed by appellee. Appellant never relied on them in support of *its*

18. The summary judgment "procedure is not, and of right ought not to be, a substitute for a trial by jury or judge," *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9 Cir.).

construction. On the contrary, appellant *moved to strike these affidavits as inadmissible evidence* (R. 71, 112).

Furthermore, when this Court's opinion rests upon the view that it was "obvious" that Bradley would build a smelter near the mines, it has resolved a question of *credibility*. The record contains an affidavit of appellant's president, Mr. Oberbillig (R. 114) which states (R. 122) that "[p]rior to the execution of the 1941 agreement I was advised by the representatives of the Bradley Mining Company [appellee] that construction of a smelter close to the mining properties *was impracticable* because of the lack of an adequate power supply" and that power first became available thereafter when Idaho Power Co. built a high voltage line (R. 123).

Does Mr. Oberbillig state the facts accurately in this affidavit? Or does he state all the relevant facts? What else would cross-examination elicit were he required to state his story on the witness stand?¹⁹ Moreover, were appellee's representatives speaking to him truthfully or fairly at the time? These are questions of *credibility*. If Mr. Oberbillig's affidavit is accurate and if appellee's representatives were honestly stating their frame of mind at the time, then *it was not obvious* that appellees were contemplating building a smelter on the property. "When * * * the ascertainment of the facts of a case turns on credibility, a triable issue of facts exists, and the granting of a summary judgment is error." *Colby v. Klune*, 178 F. 2d 872, 873 (2 Cir.); *Arnstein v. Porter*, 154 F. 2d 464 (2 Cir.). A summary judgment may not be used to "withdraw these witnesses from cross-examination * * * their credibility * * * is to be determined, after trial, in the regular manner." *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, 628.

19. Cf. opinion of Pope, J. in *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 675:—"His affidavit stated * * *. Cross-examination could be most enlightening, and the cross-examiner would be entitled to ascertain the accuracy of his purported memory * * *."

B. EVIDENCE OF EXTRINSIC CIRCUMSTANCES IS ADMISSIBLE BECAUSE THE FACT THAT TWO COURTS HAVE REACHED OPPOSITE CONCLUSIONS ON THE MEANING OF THE CONTRACT SHOWS THAT IT IS SUSCEPTIBLE OF DIFFERENT MEANINGS AND THEREFORE AMBIGUOUS.

In *Salant v. Fox*, 271 Fed. 449, the Third Circuit said (p. 451):

"If we had been the first called upon to interpret this contract we should have regarded its language as clear and unambiguous, and have construed it accordingly; *but as the contract has been submitted to another court, it has given rise to three radically different interpretations, we must assume that its language is ambiguous and is susceptible of different meanings.*"

This Court similarly held in *United States v. Dollar*, 196 F.2d 551, where it reversed a summary judgment in a case turning on the meaning of a contract. The same contract had been in issue in *Dollar v. Land* in the District of Columbia, where the District Court construed the contract one way but was reversed by the Court of Appeals, which gave it a different construction. This Court said:

"The facts and circumstances before the courts in the case decided in the District of Columbia Circuit were such that reasonable minds not only could, but did, draw from them opposing inferences as to the nature and effect of the transaction. This being true the case was not one for summary disposition, but for trial and findings. Detsch & Co. v. American Products Co., 9 Cir., 152 F. 2d 473."

In *Davis v. Basalt Rock Co.*, 114 C. A. 2d 300, 250 P. 2d 254 (hearing by California Supreme Court denied) it was said (p. 307):

"We readily admit * * * that both sides frequently stated that in many respects concerning the disputes between them,

indeed in most, the contract was not ambiguous, but on the contrary clear, certain and not to be misunderstood. *Nevertheless, each side claimed that the contract clearly declared in the way they interpreted it, and just as clearly excluded the meaning contended for by the opposing side. Such a situation is a familiar one. Such a situation also lends support to a determination that a contract capable of stating so clearly such opposite things is sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation."*

In the present case Circuit Judge Healy, sitting in the District Court, held that the contract on its face unambiguously meant what appellee claims. This Court feels otherwise. If the case had to be decided without the aid of extrinsic evidence, this Court's decision would have to control. But the fact that the two courts differ shows that the contract is "sufficiently ambiguous to justify the calling in of all permissible aids for its proper interpretation" and therefore that the case should be tried.

Both intellectual humility and logic lead to this conclusion. The term "ambiguity" in the sense of the rule under consideration merely means that the contract is "susceptible of several significations", *Salant v. Fox*, supra; that it is "capable of being understood in more senses than one", *Whiting Stoker Co. v. Chicago Stoker Corporation*, 171 F. 2d 248, 250, 251 (7 Cir.), or that the "language used is fairly susceptible of two constructions" or "*any* doubt exists", *Barham v. Barham*, 33 Cal. 2d 416, 202 P. 2d 289; or, as stated in *Twin Falls Orchard & Fruit Co. v. Salsbury*, 20 Ida. 110, 117 Pac. 118, 122, "there is room for doubt", or, as stated in *Stone v. Bradshaw*, 64 Ida. 152, 128 P.2d 844, "different minds might well reach different conclusions". California law and Idaho law concur and control. Here the matter is not open to surmise. Different minds *have* reached different conclusions.

C. A REVIEW OF THE CONTRACT AND OF THE AVAILABLE EXTRINSIC EVIDENCE SHOWS THAT THERE SHOULD BE A TRIAL TO RECEIVE THE EVIDENCE.

In the remainder of this petition we point to the questions raised by the text of the writing and to the available extrinsic evidence pertinent to their solution. If the case should be tried and this evidence received, it will, we feel, compel the construction we assert. But the question for this Court is something less: If the trial court after a trial adopts appellee's construction on the basis of the evidence and the witnesses, would the evidence support it? If so, we are entitled to that trial.

1. Smelting Is Not Considered Part of a Miner's Ordinary Treatment Processes, and Values Added by Smelting Are Not Values from the Mining Property.

The basis of this Court's opinion is the holding that where appellee owns the smelter the "net smelter returns" provision of the contract does not apply and that the "net revenue" provision does. It is therefore necessary to examine the "net revenue" clause to see what is the "net revenue" upon which the 5% is to be calculated. The very first question to be asked and answered is: *Revenue from what?*

The Court's opinion answers this question only by a tacit assumption which extrinsic circumstances will show to be impermissible.

The "net revenue" clause of the contract reads as follows (R. 17):

"By *net revenue*, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped, taken or produced from said properties, less marketing and shipping costs from Cascade, Idaho."

This clause restricts "net revenue" to revenue "*from said properties*" (R. 17). In turn, these key words relate back to the paramount clause quoted on page 5, *supra*, which provide for a royalty "on all * * * net revenue * * * upon and for all minerals, ores,

metals or values * * * mined, extracted or taken *from the above described mining claims * * * or from any lands, grounds or claims, lodes, or deposits, within the exterior boundaries of said groups of claims*" (R. 15-16). The "properties" are the mining claims and lands, grounds, lodes or deposits within their boundaries.

Suppose appellee were to erect a warehouse on the premises, ship in ore or metal from elsewhere for storage and then reship. Would revenue from that ore or metal be revenue from ores or metals "shipped from the properties"? Patently not.

Or suppose appellee should do custom smelting at the Yellow Pine smelter, i.e., suppose it should buy concentrates produced by others from mines elsewhere and smelt them. Would the proceeds, when appellee resold, be revenue *from the properties* on which it had to pay a royalty? No rational man would say so.

The simple fact is that a pound of metal content in a mass of concentrates is not worth the same as a pound of refined metal as it comes from a smelter. The value of the refined metal is composed of two elements, (1) the value taken from the mining property, and (2) an additional value imparted to it by the smelter in refining it at the cost of labor, power, supplies and investment of capital.

The words "net revenue from the properties" or "values from the properties" cover element No. 1. They cannot include element No. 2.

The fact becomes crystal clear by resort, once again, to extrinsic evidence—and judicial notice—of *universal industry usage*, which experts will testify to and which has been embodied in the Internal Revenue Code.

Evidence will show that, in the industry, "mining" is understood to include every step from the extraction up through crushing, milling, concentrating and some simple treatment processes. *But*

it has never been deemed to include smelting. The miner commonly owns and operates a mill and concentrator, but he almost never owns or operates the smelter. Crushing and concentrating are "ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product". Smelting is not.

Section 114(b) (4) B of the Internal Revenue Code of 1939²⁰ specifically defines income from mining property in reference to depreciation and depletion allowances. We quote:

"As used in this paragraph the term 'gross income from the property' means the gross income from mining. The term 'mining', as used herein shall be considered to include not merely extraction of the ores or minerals from the ground but also *ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products*, and so much of the transportation of ores or minerals (whether or not by common carrier) from the point of extraction from the ground to the plants or mills in which the ordinary treatment processes are applied thereto. * * * The term 'ordinary treatment processes' as used herein shall include the following: * * * (iv) in the case of lead, zinc, copper, gold, silver, or fluorspar ores, potash, and ores which are not customarily sold in the form of the crude mineral product—crushing, grinding and beneficiation by concentration (gravity, flotation, amalgamation, electrostatic, or magnetic), cyanidation, leaching, crystallization, precipitation (*but not including as an ordinary treatment process electrolytic deposition, roasting, thermal or electric smelting, or refining*), or by substantially equivalent processes or combination of processes used in the separation or extraction of the product or products from the ore, *including the furnacing of quicksilver ores.*"

20. We quote the Internal Revenue Code of 1939 because it was the text in effect when the contract was made. The comparable provisions of the Internal Revenue Code of 1954 are in Section 613(c) and are the same except for paragraphing.

Certainly, we should be entitled to an opportunity to prove by expert evidence the industry distinction which this statute recognizes. To put it succinctly, *there is a difference between mining and metallurgy*. Certain simple metallurgical processes normally applied by mine owners or operators have by long custom come to be treated as part of the mining, but the metallurgical process par excellence—smelting—the very type of metallurgy since the days of Tubal-cain—has not.

Appellant's own pleadings in this case recognize the distinction between revenue or values "from the properties" and additional revenue or value obtained from subsequent metallurgy. In drawing its complaint appellant subconsciously and naturally followed industry usage, and thereby the complaint substantiates appellee's position. Thus the complaint alleges (R. 7):

"That at the time said agreement was entered into and thereafter until the commencement of smelter operations upon the mining properties, as hereinafter alleged, defendant Bradley Mining Co. mined, extracted and took from said mining properties minerals, ores, metals and values, consisting among others of gold, silver, antimony, tungsten, sulphur, arsenic and copper."

And in the next paragraph (R. 8):

"That the greater part of the minerals, ores, metals and values extracted from the mining properties are, and since July 1949 have been, processed through said Yellow Pine smelter. After such processing the saleable products are sold * * *."

Note the contrast: Values are "mined", "extracted" or "taken" "from said mining properties". *Thereafter* they are processed through said Yellow Pine smelter.

Under the "net revenue" clause of the agreement appellant is entitled to its 5% of the values derived from "mining"—i.e., "mined" or "extracted" or "taken" "from the properties". But it is

not entitled to 5% on the additional values added by the *metallurgy*. Yet this is what it will receive if it is given 5% on the aggregate value after processing without a deduction of smelting charges.

The distinction becomes obvious by realizing that one person may conduct several distinct businesses. If he does, the revenues he receives from the one should not become confused with the revenues he receives from another.²¹

If value added by the smelter is revenue "from the properties", what element makes it so? Is it the physical location? Or is it ownership? Reflection suffices to show that neither of these elements should be relevant, for each is fortuitous.

Suppose a third party had bought or leased enough of the surface at Yellow Pine to erect the smelter there, did so, and operated it. Surely its smelter charges would be deductible before calculation of the royalty. Thus location is not a relevant factor.

Suppose that, instead of building a smelter at Stibnite, appellee had taken the same \$2,000,000 (R. 47, 62), which that smelter cost, and purchased and enlarged the Harshaw smelter at El Segundo, California. No one would contend that appellant would thereby become entitled to the windfall of having its 5% royalty calculated before deducting the smelter charges which the El Segundo smelter made. Thus ownership is not a relevant factor.

If neither ownership nor location is relevant, does a combination of the two alter the fact that smelting is a separate business from

21. For example, assume that the owner of a cattle ranch sells it to another for a purchase price to consist of a promise to pay 5% of the value of the products of the ranch, which has been raising and selling cattle on the hoof. The price of beef on-the-hoof is 25¢ a pound. Years later the new owner builds a slaughterhouse, invests his capital and pays for labor, in order to sell dressed beef at 50¢ per pound. Or suppose he goes a step further and puts in facilities to operate a dude ranch so as to be able to sell steaks at \$5 per pound. Would the transferor now be entitled to obtain 20 times the royalty as before? To say yes would confuse the values of the ranch products with additional values added by other labor and investment in a different kind of enterprise.

mining, and that the values added by smelting are separate from values "from the properties"?

That is answered by yet another example already given. Should appellee enter into the business of custom smelting and buy concentrates from others and smelt them at the Yellow Pine smelter, appellant patently would have no right to any royalty thereon.

Or suppose that appellee should erect on the property a fabricating plant to fabricate the refined metal, after smelting, into objects of commerce for consumer use, or should establish on the premises a factory to fabricate gold into jewelry. Surely no one would claim that appellant would be entitled to 5% of the sales price of the jewelry or other fabricated articles.

Another illustration is furnished by a present case relative to antimony. This metal, as it comes from the smelter, sells commercially for from 30¢ to 40¢ per pound. By extraordinary special post-smelting treatment in a laboratory a high-purity antimony can be made which sells for \$5 per pound. It would be a strange contention were appellant to claim 5% of the \$5 without deduction for the special treatment.

We submit, then, that ownership and location are not relevant factors.

The test of whether the costs of an operation are deductible before calculating royalty is whether the operation is a normal part of the miner's activities or a different business from mining. And the answer to this is to be found in the extrinsic evidence of the usages, customs, and terminology of the mining industry.

Before leaving this subject certain closely analogous situations may be noted. In *Helvering v. Bankline Oil Co.*, 303 U. S. 362 (reversing this Court), the Supreme Court refused to allow a percentage depletion based on the entire proceeds from the sale of casinghead gasoline. Only part of the value came from the "mining". The rest was from refining.²²

The words "from the properties" as a qualifier of "net revenue" may not be ignored but must be given meaning. The 1941 contract had been preceded by other royalty contracts between the parties. Evidence will show that a "net revenue" clause first came into the 1939 option agreement (R. 78). But, as the clause there appeared, the words "from the properties" were not present. In that agreement the clause read:

"By net revenue, as used herein, is meant the amount paid by any purchaser from the sale of concentrates, ores, metals or values shipped less marketing and shipping costs from Cascade, Idaho". (R. 91)

The addition in the 1941 contract of the words "from the properties" was a *limiting* term. The extrinsic evidence ought to be admissible to show its significance.

2. The Term "Metals Produced from the Properties" Has a Distinct Application That Does Not Extend to the Smelter.

We have been discussing the question of what is revenue "from the properties". Noting the contract definition of "net revenue" as the "amount paid by any purchaser from the sale of * * * metals

22. *Danciger Oil etc. Co. v. Hamill Drilling Co.*, 171 S.W. 2d 321, 141 Tex. 153, "involved the construction of an oil and gas mining contract". Buying an oil lease interest, Danciger promised to pay a certain percentage "of all the oil, gas, casinghead gas and other minerals produced, saved and marketed * * * from the properties * * * *free and clear of operating expenses* * * *" Then Danciger built an absorption or distillation plant on the premises to separate the gas into its component parts. The issue was whether the royalty was to be paid on the receipts of the products manufactured from the gas, without any deduction for the cost of processing the gas into gasoline and other products. The Supreme Court of Texas, reversing the lower courts, held no, stating (p. 322) that the royalty owner was not entitled to a share of the values added by a manufacturing process.

To the same effect is *Armstrong v. Skelly Oil Co.*, 55 F.2d 1066 (5 Cir.).

or values shipped, taken or produced from said properties”, this Court’s opinion states (Op. p. 3):

“We construe the word metals ‘produced’ as differing from the word metals ‘taken’ from the mines. Here they were produced by Bradley’s smelter.”

We gather that this Court’s conclusion has been influenced by a rule of construction which we concede is cardinal and on which we rely later in this petition, viz: that a construction ought to be adopted that gives effect to every provision of a contract. Allocating or applying each of the verbs “shipped, taken or produced” to each of the nouns “concentrates, ores, metals or values”, the Court reads the contract as providing for royalty on “metals produced” from the property.

But metals “produced by the smelter” are not “produced from the properties.”

If there could be no *metals* coming “from the property” unless they were metals coming out of a smelter thereon, a court might be impelled to conclude that the phrase comprised such values, since otherwise it would comprise nothing.

But this reads the phrase out of the matrix of industry realities. Extrinsic evidence will show a variety of ways in which free metal is produced at a mine. The milling process in various mills produces a certain amount of free metal depending on the ore, particularly free gold. Again, one of the commonest methods of obtaining metallic gold is the cyanide process, and extrinsic evidence will show that when the Yellow Pine mill was first put in operation in 1931, it included a cyanidation plant. Extrinsic evidence will further show that cyanidation is not smelting. Just as Section 114(b) (4) (B) of the Internal Revenue Code, quoted above, states, it is one of “the ordinary treatment processes normally applied by mine owners or operators.”

Again, we note that appellant's name is "United Mercury Mines Company." The property contains or was thought to contain *cinnabar*, i.e., mercury ore. The 1939 option agreement, from which the "net revenue" clause was lifted, specifically included a "Cinnabar Group" of claims (Cf. R. 81). Extrinsic evidence will further show that the word "metals" came into the contracts of the parties in 1939, and at that time the property was thought to be valuable for mercury.

A letter of December 30, 1941, from appellant's counsel to appellee, written in the course of the negotiations, stated:

"Then in time you may produce something other than concentrates which would be shipped to other than a smelter. If you found a *cinnabar* deposit you would not ordinarily ship your product to a smelter, and I believe we should include the words 'to market' and 'market returns'."

Now cinnabar is neither milled nor smelted. The crushed ore is merely roasted to produce the metal mercury. Evidence will show, as Section 114(b) (4) (B), I.R.C., also states, that the "furnacing of quicksilver ores" is classed as an ordinary treatment process by the miner.

In short, the phrase "metals * * * produced from said properties", can be satisfied without extending these words to a situation to which they do not belong, namely, a production of values by a smelter.

Similarly, the whole "net revenue" clause has a catch-all application to various situations where smelting is not involved. It was in fact applied to unsmelted tungsten concentrates sold to buyers to be used in that form and to sales of tungsten residues. It also would be applied to sales of rock, sand, or gravel.

3. The Worthwine Letters of December 30, 1941.

As noted above, the contract of 1941 was preceded by contracts whereunder the property was that of appellant but was operated by appellee on payment of a royalty. These contracts provided for deducting, before computing the royalty, not only "smelter charges" but a trucking or hauling charge of \$2.50 per ton for each ton of concentrates "hailed from the above-described property" (R. 91-92), without regard to the destination. This was changed in the agreement of 1941 so as to limit the \$2.50 trucking allowance to a case where the concentrates were hauled or shipped "to Cascade, Idaho" (R. 17). Why this change?

Extrinsic evidence contains a letter dated December 30, 1941 to appellee from Mr. Worthwine who was counsel for appellant, written during the negotiations for this contract, explaining:

"it might be that in the future a mill or smelter will be erected at Yellow Pine and certainly it is not the intention of the parties that you would be allowed \$2.50 a ton haul for ore from Stibnite to Yellow Pine. * * * I am not worried about you or your family contending that you could put a mill or smelter at Yellow Pine or some other point off this particular property and be entitled to \$2.50 per ton for transporting the ores from the property to the mill or smelter, but if control of this property should pass from you and your family I do not desire it to be possible for your successors to contend that by building a mill at Yellow Pine or some other place nearby that they would be entitled to a haulage charge of \$2.50 per ton for ores."

This letter patently shows that it was contemplated that in the event appellee erected a smelter at Yellow Pine "smelter charges" would still be deductible, but that the \$2.50 hauling charge should not be.

Another letter from Mr. Worthwine to appellee refers to

"the almost *uniform and universal practice of allowing the deduction of freight, assay, and smelting charges* from what we ordinarily consider to be a net royalty."

This letter was written *the same day as the other*, is to be read in conjunction with it, and recognizes the uniform practice in the industry of allowing deduction of smelting charges, in the very context of recognition that appellee might operate its own smelter.

It will be further noted that the contract of 1941 contains a provision relative to trucking costs "should a smelter or other reduction works be erected between the mining property herein conveyed and Cascade, Idaho". In that event "there shall be deducted from the net smelter or reduction returns a fair charge for trucking from the mine to such smelter or reduction works" (R. 18). The phraseology is noteworthy. It does not merely allow the deduction of a trucking charge; the deduction is to be from the "smelter returns". Yet the party most likely to erect a smelter between the mines and Cascade would be appellee; thus Mr. Worthwine's letter to Mr. Bradley refers to "you or your family" putting a smelter "at Yellow Pine or some other point *off* this particular property."

Here, we submit, is a consistent arrangement. If the smelter should be on the property, there would be no deduction of a hauling charge; if the smelter should be between the property and Cascade, a "fair charge for trucking" would be allowed; if the smelter should be beyond Cascade, there would be a \$2.50 trucking deduction. But in every case, smelter charges are deductible, regardless of who should own the smelter.

4. Appellant's Construction Writes Words Into the Contract.

At page 6, *supra*, we saw that the issue of construction is this:

Is appellant to get the same royalty when the concentrates go through a smelter owned by appellee on the premises as if

they went through an independently owned smelter, or is it to get a greater royalty merely because the smelter is owned by appellee?

Under appellee's interpretation, the word "smelter" in the phrase "net smelter returns" encompasses *any* smelter. Appellant's construction writes into the phrase the words "independently owned" or "third party owned" so as to make it read "net independently-owned smelter returns". The contract defines "net smelter returns" thus (R. 17):

"By *net smelter returns*, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, it being understood that *the* smelter will deduct its normal smelting charges and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

Appellant's construction changes the phrase "amount received from *the* smelter" to the phrase "amount received from *any independently owned smelter*".

This Court's opinion also writes in words, by saying that the "net smelter returns clause" applies only where the returns are received from "a third party's" smelter (Op. p. 3). Those words are not in the contract.

In *Union Oil Co. v. Union Sugar Co.*, 31 Cal. 2d 300, 188 P. 2d 470, the trial court had held that on its face a contract calling for certain action should be read as if it contained the words "in any event". The Supreme Court of California reversed, observing (p. 306):

"Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation. It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that as so construed no ambiguity exists.' (*Body-Steffner Co. v. Flotill Products*, 63 C. A. 2d 555, 562 [147 P. 2d 84].)"

5. Appellant's Construction Makes the Entire "Net Smelter Return" Clause a Superfluity.

This Court's opinion holds that no smelter charges are deductible where appellee owns the smelter because it is the "net revenue" clause that then applies. The reasoning behind this holding is that where appellee owns the smelter it "receives" nothing from the smelter and so there are no "smelter returns".

But this construction reads the "net smelter" provision completely out of the contract as wholly superfluous.

Extracted from their matrix in industry usage, the phrases "smelter charges" and "net smelter returns" connote that a commercial or independently-owned smelter engages in the business of performing a service job for which it charges a toll or fee, returning to the owner of the concentrates the refined material less the charge for the service of refining. But extrinsic evidence will show that independent smelters hardly ever do charge a fee for performance of a service and that, instead, they buy the concentrates and pay a purchase price.²³

Thus what is "received" from an independent smelter is simply *revenue*. If the "net smelter returns" clause is confined to independently owned smelters, that clause becomes a superfluity, for it adds nothing whatever to the "net revenue" clause, which we quoted at page 26 above. Exactly the same revenue would be paid to appellant under the "net revenue" clause on concentrates going to an independent smelter as under the "net smelter returns" clause. But it is elementary, in every common law jurisdiction, that

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practical, each clause

23. This fact actually appears in the affidavit of Mr. Oberbillig, appellant's president, when he states (R. 132, 133) that "the common and ordinary meaning of such words [net smelter returns] [is] the net amount paid by a smelter as the purchaser of ores and concentrates".

helping to interpret the other." (Cal. Civ. Code, Sec. 1641. Cf. Restatement of Contracts, Sec. 235 (c)).²⁴

In order, then, for the "net smelter returns" clause to have any office or function, it must apply to a smelter owned by appellee.

6. Appellant's Construction Writes Out of the Net Smelter Return Clause a Significant Part.

Let us quote again the "net smelter return" clause. It reads (R. 17):

"By *net smelter returns*, as used herein, is meant the amount received from the smelter from any and all ores, concentrates, metals or values shipped to a smelter, *it being understood that the smelter will deduct its normal smelting charges* and charges for railroad freight from Cascade, Idaho, to said smelter shall also be deducted."

Note the words, "it being understood that the smelter will deduct its normal smelting charges". If the "net smelter returns" clause applies only when the smelting is done by an independent smelter, these words are superfluous, for the amount received from the smelter is what it will pay. *Its* "deductions" would not be in the control of the parties.

Extrinsic evidence will show how these words got into the contract.²⁵ In 1939 the parties entered into an option agreement, in

24. Accord: 3 Williston on Contracts 1779 (Rev. ed. 1936); 3 Corbin on Contracts 100 (1951); *Bratton v. Morris*, 54 Ida. 743, 37 P.2d 1097, 1100 (1934); *Molyneux v. Twin Falls Canal Co.*, 54 Ida. 619, 35 P.2d 651, 653 (1934); *Caldwell State Bank v. First Nat. Bank*, 49 Ida. 110, 286 Pac. 360, 362 (1930).

25. "A contract may be explained by reference to the circumstances under which it was made * * *" (Cal. Civil Code, Sec. 1647). "For the proper construction of an instrument, the circumstances under which it was made * * * may also be shown, so that the judge be placed in the position of those whose language he is to interpret." (Cal. Code of Civil Procedure, Sec. 1860). These provisions are not merely California law, they are law generally. Restatement of the Law of Contracts, Sec. 235 (d); 3 Williston on Contracts 1780 (rev. ed. 1936); 3 Corbin on Contracts 17 (1951); *Rudeen v. Howell*, 71 Idaho 365, 283 P.2d 587, 589 (1955) and cases cited therein.

which the "net smelter clause" first appeared (R. 78 at 91). At that time the parties contemplated the possibility of a smelter on the property, for the same option agreement, in the very sentence preceding this definition of net smelter returns, refers to the possibility of "local reduction of the concentrates." (R. 91). Early drafts contained the clause "it being understood that the smelter will deduct its smelting charges". This addition *is appropriate to the situation of a smelter operated by appellee. And this is underscored by the fact that the early drafts did not contain the limiting adjective "normal" before "smelter charges"*. The final insertion of the word "normal" was to protect appellant against appellee charging for smelting more than independent smelters were accustomed to do in the industry.

7. In Industry Usage "Net Smelter Returns Received" Means Returns "Realized".

Appellant's principal argument in this case is that the "net smelter clause" refers to "net smelter returns *received*", that the word "received" connotes payment by a third party, and therefore that the "net smelter" clause is not applicable to a smelter owned by appellee. And that argument was persuasive to the Court.

We therefore note a contrast on the face of the writing that calls for explanation by extrinsic circumstances. The three definitions, of "net smelter returns", "net revenue" and "net mint returns", appear consecutively (R. 17). Net revenue is defined as "the amount *paid by any purchaser*"; net mint returns are defined as "the amount *paid*" by a mint. Thus where the parties meant to refer to a purchase price *paid* by a third party, they knew how to say so explicitly. Yet, in the same context, in speaking of smelter returns, they do not say "amount paid by the smelter". They say "amount *received* from the smelter." The deliberate change in language must have a significance.

The explanation of the significance here, as elsewhere, lies in industry usage.

As long ago as 1898 and 1903, in Colorado, the heart of the Mining West, it was held that "smelter returns" in a royalty contract mean "return from the ore, less the smelting charges." *Frank v. Bauer*, 19 Colo. App. 445, 75 Pac. 930, 932.²⁶ And in *Maloney v. Love*, 11 Colo. App. 288, 52 Pac. 1029, the court said of the words "net proceeds from all smelter * * * and mill returns"

"every miner and every person familiar with transactions involving leases of mining property knows exactly what they mean. They mean that * * * charges for treatment are to come out of the gross mill or smelter values, and what is left is net proceeds."

In short, evidence of industry usage will show that "net smelter returns received" do not imply payment by a third party. Experts will testify that these words are used in the industry to signify the net *realization* after smelting, whether by way of cash paid or credit given.

The affidavit of Harold Lee touches on such usage in intracompany smelting (R. 110-112). There may be some conflict between this affidavit and that of Mr. Oberling (see footnote 23, *supra*). That conflict can only be resolved by placing both on the witness stand, subject to cross-examination and comparison with other witnesses.

8. Affirmative Allegations and Practical Construction by the Parties' Conduct; the Boise Purification Plant.

In defendant-appellee's answer to the complaint, it made certain positive averments of fact (R. 48, 49), including this:

"that for a long period of time after the execution of the agreement of December 31, 1941 and for a long period of time after the construction and commencement of operations of the Yellow Pine Smelter the plaintiff construed said agreement to entitle it to receive a royalty of five per cent upon net

26. The court there commented that evidence of "any custom defining the meaning of these words" would be admissible.

smelter returns irrespective of the ownership or location of the smelter receiving the concentrates, thus construing and interpreting the language of the agreement in the same manner as the same is now and at all times has been, construed and interpreted by this defendant, and during said period plaintiff accepted without reservation royalty payments so computed * * *."

If this averment is true, it is a potent, if not controlling, factor in construing the contract. No rule of interpretation is better settled than that the construction placed on a contract by the acts and conduct of the parties is well nigh binding. *Barham v. Barham*, 33 Cal. 2d 416, 202 P. 2d 289; *Tanner v. Title Ins. & Trust Co.*, 20 Cal. 2d 814, 823; 129 P. 2d 383; *Cottle v. Oregon Mut. Life Ins. Co.*, 60 Ida. 628, 94 P.2d 1079; Williston on Contracts, Secs. 623, 629. Thus in *Frank v. Bauer*, 19 Colo. App. 445, 75 Pac. 930, the court said (p. 932):

"* * * the parties themselves construed the contract in this respect by paying royalty upon the value of the ore at the smelter, *less smelting charges*. They thus defined the meaning of the words 'mint or smelter returns,' and this interpretation, in the absence of other evidence, we are justified in accepting."

Additionally, extrinsic evidence can be offered to show that appellee built a "purification plant" in Boise and in 1944-45 processed tungsten concentrates from the properties through this plant in order to make them marketable. Prior to building this plant appellee sent its tungsten concentrates to Vitro Manufacturing Co. and Wah Chang Trading Corporation, which did not buy but purified them, charging a fee for the service. When appellee then sold the product, it paid the 5% royalty on the proceeds *after first deducting the charges of Vitro and Wah Chang*. Its accounting to appellant showed the facts and the deductions were accepted as proper.

Thereafter appellee built the Boise Purification Plant to do the job formerly done by Vitro and Wah Chang. The type of treatment used in the Boise Purification Plant embodied leaching, flotation and roasting, and thus stood midway between the ordinary treatment processes normally applied by mine operators and smelting processes. Appellee deducted its costs of operating this plant before calculating appellant's royalty on the proceeds, just as formerly it had deducted the charges of Vitro and Wah Chang. Its accounting to appellant showed exactly what it did, and appellant accepted the practice and accounting as proper. This demonstrates that appellant did not consider itself entitled to royalty on that part of the "amount paid by any purchaser" which was due to added value created by appellee's activity and expenditures not within the ordinary treatment processes of miners. *A fortiori*, deduction of smelting charges at a Bradley-operated smelter is proper.

The significance of the fact cannot be doubted. Mr. Oberbillig, appellant's president, recognized the parallel, for he referred to the Boise Purification Plant in his affidavit and first averred (R. 122) that

"Bradley sold the tungsten W03 to purchasers and paid the United Mercury Mines Company its royalty on the basis of five per cent of the amount received from the purchasers *with no charge or reduction in the royalty on account of the operation of the reconditioning plant at Boise, Idaho. The operation performed by the reconditioning plant at Boise served in part essentially one of the same processes in reducing tungsten concentrates to tungsten W03 that the Yellow Pine smelter serves in reducing antimony concentrates to antimony metal or antimony oxides.*"

Mr. Oberbillig's statement that no deductions were made was erroneous, and he withdrew it by stipulation on the ground that it was inaccurate (R. 133, 134).

Can appellee properly be denied the opportunity to try to prove its verified allegation and the facts about the Boise Purification Plant? In the words of *Hycon Manufacturing Company v. H. Koch & Son*, 219 F. 2d 353, 355 (9 Cir.), "No comment is required". A summary construction of the contract against appellee, denying it this opportunity, is, we submit, simply unthinkable.

9. Other Extrinsic Circumstances:—Purpose of the Contract and Credibility.

Other relevant extrinsic circumstances can be related, but we refrain so as not to convert this petition into a trial brief. We content ourselves with sketching two.

Extrinsic evidence will show that the 1939 contract provided for a higher percentage as royalties than did the 1941 contract (see R. 90); that the properties contained low grade ores which appellee could not afford to mine and beneficiate at those higher royalty rates; that appellant was willing to accept the lower rates because the higher would produce either less actual royalty or none at all since they would preclude operations, whereas the lower rate would give appellant an increased return because of increased tonnage; and that appellee's reason for building the smelter was that the available ore had become so low grade that it would otherwise be uneconomic to operate.

Under appellant's construction that its present royalty is to be calculated before deducting the smelting charges, appellee will have to pay nearly double the royalty it would pay if the concentrates went through an independent smelter. With this added burden the time will be longer delayed before appellee can afford to renew operations, and after renewal the periods of operation will be of shorter interval. Low grade ores will cease to be mineral reserves, for in the usage of the mining industry a reserve is only a deposit that can economically be worked.

A consequence of appellant's construction of the contract is thus to defeat or tend to defeat a major purpose of the 1941 contract,

contrary to the principle that a contract should be construed so as to effectuate, not defeat, its purpose (Cf. Cal. Civil Code, Sec. 1636, 1643, 1648). Appellant can afford to insist on its interpretation only because appellee is already mired in its investment of \$2,000,000 and may have to operate the smelter to cut its losses.

What has just been said brings up another item of *credibility*. Mr. Oberbillig's affidavit asserts that he did not know until 1949, after the smelter was built, that appellee construed the contract as permitting deduction of the smelter charges (R. 124). But the contrary is perfectly demonstrable. We have and can place in evidence letters from Bradley to Oberbillig written in 1948 before the smelter was built, in which appellee's understanding of the contract is plainly stated. Indeed, Mr. Oberbillig's affidavit elsewhere quotes from such a letter written in March 1948 (R. 131, 132). Either credibility is involved or cross-examination is needed to explain the inconsistency of Mr. Oberbillig's assertions and the fact that he wrote no reply to appellee challenging appellee's construction but silently permitted the smelter to be constructed.

CONCLUSION

Some of the items of extrinsic evidence mentioned above are in the present record (although only by affidavit and incompletely). Some are not, but those not in the record are absent because there has been no trial. The essence of this petition for rehearing and motion for modification is that appellee is entitled to a trial in order to get this evidence into the record in the manner provided by law and guaranteed by *Fountain v. Filson*, 336 U. S. 681.

Appellant will not be injured by the requested modification of this Court's decision, because

1. A trial of the issue of contract interpretation is all that appellant sought by its appeal.

2. If, after trial, the District Court should find from adequate evidence that the actual intent of the parties was as appellee contends, an injustice will have been avoided. If the evidence should support appellant, it will then prevail.

Whatever construction is finally placed on the contract by final judgment in this action will grip it for nearly a millenium to come.

We respectfully submit that the petition or motion should be granted.

Dated: San Francisco, California, March 19, 1956.

MOSES LASKY
WM. E. COLBY
JOHN PARKS DAVIS
Attorneys for Appellee.

BROBECK, PHLEGER & HARRISON

Of Counsel

We hereby certify that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

MOSES LASKY
WM. E. COLBY
JOHN PARKS DAVIS

(Motion for Modification attached)



In the

United States Court of Appeals

For the Ninth Circuit

UNITED MERCURY MINES COMPANY,
a corporation,

Appellant,

vs.

BRADLEY MINING COMPANY,
a corporation,

Appellee.

**Motion for Modification of Decision and Judgment
Under Fountain v. Filson, 336 U.S. 681.**

Appellee BRADLEY MINING COMPANY hereby moves the court for an order modifying the decision and judgment rendered herein on February 8, 1956, in the following respects:

1. By limiting the judgment to a simple reversal of the judgment of dismissal of the District Court with a remand for a trial on all relevant issues, including the issue of interpretation and construction of the contract between appellant and appellee dated December 31, 1941, copy of which is attached to the complaint herein as Exhibit 1, at which trial the parties shall be permitted to offer all pertinent extrinsic evidence in aid of interpretation of the contract, and to that end

2. Striking the last sentence of the decision and judgment of February 8, 1956 reading:

“The judgment is reversed and the district court ordered to entertain United’s complaint in the light of our construction of the contract”

and substituting therefor either the following:

“The judgment is reversed and remanded to the district court for a trial on all relevant issues, including the issue of interpretation and construction of the contract, copy of which is attached to the complaint herein as Exhibit 1, at which trial the parties shall be permitted to offer all pertinent extrinsic evidence in aid of interpretation of the contract”

or other language appropriate to the purpose stated in paragraph 1 above, and

3. Striking those portions of the opinion and judgment inconsistent with said purpose, including the portions reading thus:

“It is equally obvious that, if Bradley built the smelter, the above quoted contract’s clause for ‘net smelter returns’ which are to be ‘received from’ a third party’s smelter does not apply. We must look elsewhere in the contract for a provision creating a basis for royalties, since it is not conceivable that the parties intended that United would be deprived of all royalties by the simple device of Bradley building its own smelter near its mines.

“We hold that this situation is provided for by its language respecting metals produced from the mines by Bradley’s smelter. ‘Bradley * * * does hereby * * * agree to pay to United * * * a royalty of five per cent (5%) on all * * * net revenue * * * as defined herein.’ The definition is ‘By net revenues, as used herein, is meant the amount paid by any purchaser from the sale of * * * metals or values *shipped*, taken or *produced* from said properties, less marketing and shipping costs from Cascade, Idaho.’ (Emphasis added.)

“We construe the word metals ‘produced’ as differing from the word metals ‘taken’ from the mines. Here they were produced by Bradley’s smelter. We do not agree with the district court’s holding that ‘the contract does not reflect any precise basis for computing the royalty.’”

The motion is based on the records of this Court and is made on the ground that

- (a) this Court lacks power in the premises to place a controlling construction on said contract, and
- (b) that it is erroneous for the Court to do so,

since by doing so it directs a summary judgment for appellant on the issue of interpretation whereas a genuine issue of fact as to said interpretation exists on which appellee is entitled to a full trial. Appellee further adopts and incorporates herein as grounds of this motion all the grounds stated in the petition for rehearing to which this motion is attached.

Dated: March 19, 1956.

MOSES LASKY

WM. E. COLBY

JOHN PARKS DAVIS

Attorneys for Appellee.

BROBECK, PHLEGER & HARRISON

Of Counsel

